(22,337)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 143.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

MARY R. SCHUYLER AND RHEA SCHUYLER, EDWARD SCHUYLER, VERA SCHUYLER, AND DOROTHY SCHUYLER, INFANTS, BY JOHN M. FORRISTALL, THEIR GUARDIAN *AD LITEM.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a *Record on Appeal from Second District Court of Weber County to Supreme Court of the State of Utah.*

MARY R. SCHUYLER and REA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC COMPANY, Defendant & Appellant.

For the Plaintiffs: Messrs. Agee & McCracken, Bert Schlesinger, Esq.

For the Defendant: P. L. Williams, Esq., Geo. H. Smith, Esq., Jno. G. Willis, Esq., E. M. Bagley, Esq.

1 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Complaint.

The plaintiffs complain of the said defendant and for cause of action, allege:

1. That Charles Albert Schuyler, late of the county of Alameda, State of California, died intestate in the State of Utah, on the 14th day of January, A. D. 1907, being at the time of his death a resident of the county of Alameda, in the State of California, and that he left, him surviving, as his only heirs at law, the plaintiff Mary R. Schuyler, his widow, and the plaintiffs Rhea Schuyler, eleven years old, Edward Schuyler, nine years old, Vera Schuyler, seven years old, and Dorothy Schuyler, five years old, all minor children of the said deceased and the plaintiff Mary R. Schuyler, and that on the 27th day of March, A. D. 1908, John M. Foristall was, by the district court of the Second Judicial District of the State of Utah, in and for the county of Weber, duly appointed guardian ad litem of the said minor children for the purpose of beginning and prosecuting this action for and on behalf of said minors as heirs of said deceased and as co-plaintiffs of the said Mary R. Schuyler, and that all
2 of the plaintiffs, at the time of the death of the said deceased, were and from thence hitherto have been and now are residents of the County of Alameda, in the State of California, and citizens of that State.

2. That said defendant is, and at all the times herein mentioned was, a corporation duly incorporated under the laws of the State of Kentucky, and a citizen of said State of Kentucky, and during all

the times herein mentioned was engaged in the maintenance and operation of various lines of railroad, including a line of railroad extending from the city of San Francisco, in the State of California to the City of Oregon, in the State of Utah, over which it ran and operated trains and cars for the transportation of passengers for hire and in carrying and transporting the mails of the Government of the United States under arrangements between it and the Government of the United States for the carrying of such mails and the employees and mail clerks of the United States engaged in the supervision, handling and care of such mails while being so transported by the said defendant, and for which transportation of the said mails, mail clerks and employees of the Government of the United States the said defendant received compensation from the Government of the United States.

3. The plaintiffs further allege on information and belief that in the operation of its said line of railroad the defendant, at all the times herein mentioned, used and ran many engines of great size and weight, to-wit, of about one hundred tons weight, at a high rate of speed over said line of railroad and over the track of said line of railroad between the stations of Gartney and Lucin, in the State of Utah. That the said track of the said line of railroad between said stations of Gartney and Lucin was by said defendants negligently and carelessly constructed, and the rails and joints thereof were not
3 sufficiently supported, and the rails were not sufficiently spiked or otherwise fastened to the ties on which they rested to make the same strong enough or solid enough to be reasonably safe for the passage of engines and trains of such great weight as were the engines and trains so by it operated and run over the said line and track, and by reason thereof there was a constant danger of the rails of the said track spreading or giving way under the pressure and weight of such engines and trains, and at a point on said line of railroad between said stations of Gartney and Lucin, where the passenger train hereinafter mentioned was derailed and wrecked and where the deceased Charles Albert Schuyler was killed, as hereinafter alleged, the said defendant had negligently and carelessly permitted the track of said railroad to become out of repair, and in a weak and dangerous condition and unsafe for the passage of engines and trains, so that there was constant danger of the derailment of trains when run over the same, and the said defendant carelessly and negligently permitted said track to remain out of repair and in such a dangerous and unsafe condition for many hours and until about six o'clock of the forenoon of the 14th day of January, A. D. 1907, and until the derailment of the engine and train and the death of the said deceased was caused as hereinafter alleged, and that the said defendant, its agents and servants had knowledge and notice of the unsafe and dangerous condition of said track as aforesaid for many hours before the derailment of said engine and train, and by the exercise of reasonable and ordinary care could have repaired said track and made the same safe, and could have given warning to the persons employed in the running and management of said train of the dangerous and unsafe condition of said track in time to have avoided

the derailment of said engine and train, and the consequent death of said deceased, as hereinafter alleged.

4 4. That on and prior to the 14th day of January, A. D. 1907, the deceased, Charles Albert Schuyler, was in the employ of the Government of the United States, as a clerk in the Railway Mail Service, and in the discharge of his duties as such employee it was necessary for him to ride on trains of said defendant, and in [illegible] cars of such trains between the city of San Francisco, in the State of California, and the city of Ogden, in the State of Utah, and over the line of railroad and track between the stations of Gartney and Lucin herein described and that for the transportation of the mails of the United States and the mail clerks employed by the United States to supervise, handle and care for said mails, including the said deceased, the said defendant received compensation from the Government of the United States. That on said 14th day of January, A. D. 1907, the said deceased, while so in the employ of the United States Government, as such clerk, was necessarily in a certain mail car attached to an east bound passenger train No. 10, on the defendant's said line of railroad, known as the fast mail train, and was being transported by the said defendant as such clerk on said train, and the said defendant had undertaken, for a consideration and under arrangements between it and the Government of the United States, to safely transport the deceased, as such employee and clerk from the city of San Francisco aforesaid to the said city of Ogden, but while said deceased was in said car with the knowledge and consent of the said defendant, its agents and servants, as such clerk, and in the discharge of his duties as such, between the stations of Gartney and Lucin, in the State of Utah, the said defendant negligently and carelessly ran and caused to be run the said passenger train at a high rate of speed, to-wit, at the rate of about fifty miles per hour, which speed, owing to the unsafe and dangerous condition of the said track, as hereinbefore alleged, was a too high and a dangerous rate of speed, although the said defendant,

5 its agents and servants knew that the said railroad track between said stations of Gartney and Lucin was so negligently and carelessly constructed and maintained, as hereinbefore alleged, and was so out of repair as to make it unsafe and dangerous to run and operate engines and trains over the same, and especially unsafe and dangerous to run an engine and train at a high rate of speed, and when the said engine and train reached a point about one and three-fourths miles east of Gartney, and while the same was running a high rate of speed, to-wit, at about fifty miles per hour, by reason of the improper and unsafe construction of the track at that place and the insufficient support and the insufficient fastening of the rails and joints of said track as hereinbefore alleged, and by reason of the said track having by said defendant been permitted to become and remain out of repair and in an unsafe and dangerous condition for the passage of trains over the same, as hereinbefore alleged, and especially for the passage of trains at the high rate of speed at which the defendant permitted and required its passenger trains to be run over said track, and by reason of the great weight

of said engine and train and the high rate of speed at which the same were run, the said engine and train were suddenly derailed and the car in which said deceased was riding was overturned and thrown with great force and violence from the said track and the said deceased, without fault or negligence on his part, but owing entirely to the negligence and carelessness of the defendant, its agents and servants, as herein alleged, was then and there killed.

5. Immediately prior to the time of the injury and death of the said deceased he was of the age of forty-four years and in good health, with a reasonable expectation of twenty six years of continued life, was sober, industrious, and capable of earning and was earning the sum of $117.00 per month, which he devoted to the support of himself and the plaintiffs, and so the plaintiffs allege
6 & 7 that by reason of all the facts herein alleged, and the negligence of the defendant herein alleged, and the consequent death of the said Charles Albert Schuyler, they have sustained damages in the sum of $50,000.00, no part of which has ever been paid.

* * * * * * *

8 Wherefore, the plaintiffs demand judgment against the said defendant for the sum of $50,000.00 on their first cause of action herein, and the further sum of $1227.00 on the second cause of action, together with interest on the said sum of $727.00 from the 14th day of January, 1907, together with costs of this
9 action.

BERT SCHLESSINGER,
AGEE & McCRACKEN,
Attorneys for Plaintiffs.

STATE OF UTAH,
County of Weber, ss:

A. W. Agee, being first duly sworn, says he is one of the attorneys for the plaintiffs in the above entitled action, and makes this affidavit of verification because the said plaintiffs, and each of them, is absent from the County of Weber, State of Utah, in which said action is brought, and is absent from the state of Utah, and that the facts stated in the foreging complaint are true to the best of his knowledge information and belief.

A. W. AGEE.

Subscribed and sworn to before me this 6th day of April, 1908.

ROBERT G. AGEE,
Notary Public.

Endorsed on Back: Mary R. Schuyler, et al. v. Southern Pacific Co. Complaint. Received Copy of the within complaint this April 7, 1908. P. L. Williams, by C. R. N. Filed Second District Court Webster County, Utah, April 6, 1908. David Mattson, Clerk, by Harry Hales, Deputy.

10 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Petition for Removal.

Your petitioner, the Southern Pacific Company, a corporation, organized, created and existing under and by virtue of the laws of the State of Kentucky, doing business in the State of Utah, under and by virtue of the laws of said state, pertaining to foreign railroad corporations, respectfully shows this court that the matter and amounts in dispute in the above entitled suit exceeded, exclusive of interest and costs, the sum or value of two thousand dollars ($2000.00); and that said suit is of a civil nature.

That the defendant in the above entitled cause, is a corporation, as aforesaid, having its principal office and place of business within the state of Utah, at the city of Ogden; and it was at the commencement of this suit, and still is, a resident of, and a citizen of the state of Kentucky; that the plaintiffs in the above entitled cause are, and each of them were, at the time of the commencement of this
11 suit, and still are, citizens and residents of the County of Alameda, State of California.

That the suit herein is of a civil nature at law, arising under the constitution and laws of the United States, section VIII, of Article I, declaring that Congress shall have power to "establish postoffices and post roads;" also "to regulate commerce with foreign nations and among the several states." Also, under the Act of Congress of the United States, approved June 13th, 1898, and June 9th, 1896, and Acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks and other officers of the postoffice department of the Government of the United States; also the Act of March 3rd, 1887, pertaining to messenger service in connection with railroads, etc.; also Act of Congress of the United States, approved February 4th, 1887, and Acts amendatory thereof, including the Act approved June 29th, 1906.

Your petitioner shows that the controversy herein arises from the following facts, as shown by the complaint filed herein: That the Southern Pacific Company was, and at all the times mentioned in said complaint, a corporation, as aforesaid and as such was engaged in operating a line of railroad into and through the states of Utah, Nevada, and California, and, among other things, was engaged in transporting United States mail from San Francisco, in the State of California, to Ogden, in the State of Utah; and as incident thereto, certain employees of the Government of the United States, in the nature of mail clerks, attended the transportation of said mail as such

employees of said Government. That about the 14th day of January, 1907, one Charles Albert Schuyler, as an employé of said United States Government, in the said railway mail service, whilst riding upon one of the cars forming the consist of one of defendant's trains, then being operated over said line of railroad between
12 said points, received injuries, from which he thereafter died. That at the time of the death of the said Charles Albert Schuyler, he had in his possession a large sum of money, to-wit, seven hundred and twenty-seven dollars ($727) and in addition thereto, a certain gold watch, chain and watch fob, of the value of five hundred dollars ($500.00), which said deceased had and possessed on and about his person while occupying a position in a certain car allotted by said Southern Pacific Company for the transportation of said United States mail. That each and every of said sum of money watch, chain and fob, were totally destroyed and lost as a result of the accident wherein said deceased received the injuries aforesaid.

Your petitioner offers herewith good and sufficient sureties for its entering in the Circuit Court of the United States for the District of Utah, on the first day of its next session, a copy of the record in this suit; and for paying all costs that may be awarded by said circuit court, if said court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said sureties and bond, and to cause the record herein to be removed into said Circuit Court of the United States, in and for the District of Utah; and it will ever pray.

SOUTHERN PACIFIC COMPANY.
By P. L. WILLIAMS, *Its Attorney.*

13 STATE OF UTAH,
County of Salt Lake, ss:

John G. Willis, being duly sworn, on oath, says: I am one of the attorneys for the above named petitioner, that the foregoing petition is, and the matters therein set forth, are, true, to the best of — knowledge, information and belief.

JOHN G. WILLIS.

Subscribed and sworn to before me this 14th day of April, A. D. 1908.

[SEAL.] L. B. SWANER,
Notary Public.

Received copy of the within this 16th day of April, 1908.

AGEE AND McCRACKEN,
Attorneys for Plaintiffs.

Presented this 16th day of April, 1908.

J. A. HOWELL, *Judge.*

Endorsed on back: Second District Court, Weber County, Utah. Filed April 16, 1908. David Mattson, Clerk, by Frank J. Hendershot Deputy.

14 Know all men by these presents, That the Southern Pacific Company, a corporation organized, created and existing under and by virtue of the laws of the State of Kentucky, and doing business in the State of Utah, under and by virtue of the laws of said State relating to foreign railroad corporations, as principal, and L. S. Hills and W. W. Riter, as sureties, are held and stand firmly bound unto Mary R. Schuyler, and Rhea Schuyler, Edward Schuyler, Vera Schuyler and Dorothy Schuyler, infants, and John M. Forristall, as guardian ad litem, and to each thereof, in the penal sum of one thousand dollars ($1,000) for the payment whereof well and truly to be made unto the said Mary R. Schuyler, and Rhea Schuyler, Edward Schuyler, Vera Schuyler and Dorothy Schuyler, infants, and John M. Forristall, as guardian ad litem, and each thereof, and to each of their heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents.

On the condition nevertheless, that whereas the said Southern Pacific Company has petitioned the district court of the second judicial district of the State of Utah, in and for Weber County, for the removal of a certain cause therein pending, wherein the said Mary R. Schuyler, and Rhea Schuyler, Edward Schuyler, Vera Schuyler and Dorothy Schuyler, infants, and John M. Forristall, as guardian ad litem are plaintiffs, and the said Southern Pacific Company is defendant, to the Circuit Court of the United States, in and for the District of Utah:

Now, if the said Southern Pacific Company shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit court of
15 the United States, if said Circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, the said Southern Pacific Company and L. S. Hills and W. W. Riter have hereunto set their hands and seals, this 14th day of April, 1908.

SOUTHERN PACIFIC COMPANY,
By P. L. WILLIAMS,
LOUIS S. HILLS,
W. W. RITER, *Sureties.*

STATE OF UTAH,
County of Salt Lake, ss:

L. S. Hills and W. W. Riter, being duly sworn, each for himself says: I am a resident and citizen of the city of Salt Lake, Salt Lake County, Utah, and am a free holder within said state, and am worth the sum of two thousand dollars ($2,000) over and above property exempt from sale or execution.

LOUIS S. HILLS.
W. W. RITER.

Sworn to and subscribed before me this 14th day of April, 1908.
[SEAL.] L. B. SWANER,
Notary Public.

16 STATE OF UTAH,
County of Salt Lake, ss:

On this, the 14th day of April, 1908, before me the undersigned, a notary public, in and for said county in said state, personally appeared the above named L. S. Hills and W. W. Riter, each of whom are known to me to be the individuals described in, and who executed, the foregoing instrument, and then and there each of them severally acknowledged that he had executed the foregoing bond.
[SEAL.] L. B. SWANER,
Notary Public.

Approved this the 16th day of April, 1908.
J. A. HOWELL,
Judge of Said District Court.

Endorsed on Back: Mary R. Schuyler, et al. v. Southern Pacific Company. Bond. Second District Court, Utah. Filed April 16, 1908, David Mattson, Clerk.

17 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER, and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Objections and Demurrer.

The plaintiffs object to any order being made for the removal of this cause to the circuit court of the United States for the District of Utah, and demur to the petition of the defendant for such removal for the following reasons:

1. The petition for removal and the record show that none of the parties are citizens, residents or inhabitants of the State of Utah.

2. It does not appear from the complaint of the plaintiff- nor from the entire record in the case that the Circuit Court of the United States for the District of Utah has jurisdiction of this action.

3. It does not appear from the complaint of the plaintiffs nor the petition for removal nor from the entire record of the cause that it is an action arising under the constitution or laws of the United States, nor under any treaty made by the United States, nor
18 that any controversy over the construction of any provision of the constitution, or any act of the Congress of the United States is an any way involved.

AGEE & McCRACKEN,
Attorneys for Plaintiffs.

Endorsed on Back: Mary R. Schuyler, et al. Plaintiffs, v. Southern Pacific Company, defendant. Objections and Demurrers to the Petition for removal of case to U. S. Court. Filed in Open Court, April 25th, 1908, David Mattson, Clerk.

19 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

On this 9th day of May, A. D. 1908, being a day in the regular May Term of this court, this cause came on for hearing upon the application by petition of the defendant, praying for the removal of this cause to the Circuit Court of the United States for the District of Utah, C. R. Hollingsworth, Esq., appearing for the petitioner and defendant, and Agee & McCracken, Attorneys, appearing for the plaintiff, and the court having heard the matter and being sufficiently advised in the premises, finds that the action is not one of which the Circuit Court of the United States for the District of Utah has jurisdiction, and that the same is not removable from this court to said Circuit Court of the United States, and the petition of the defendant praying for the removal of said cause is therefore denied, to which the said defendants excepts.

J. A. HOWELL, *Judge.*

Endorsed on Back: Mary R. Schuyler et al. v. Southern Pacific Co. Filed, Second District Court, Weber County, Utah, May 11, 1908. David Mattson, Clerk.

20 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Demurrer.

The defendant demurs to the complaint filed herein, for the reasons and upon the grounds following:

I.

Because, as shown by said complaint, the plaintiffs Rhea Schuyler, Edward Schuyler, Vera Schuyler, Dorothy Schuyler and John M.

Forristall have not, nor has either of said plaintiffs, legal capacity to sue; because the said John M. Forristall is not the guardian ad litem of either of the said minor plaintiffs.

II.

Because there is a misjoinder of parties plaintiff in that the causes of action attempted to be sued on in said complaint are several, independent and peculiar to each plaintiff, and in nowise joint.

III.

Because several causes of action have been improperly united in said complaint, for the reasons stated in the paragraph numbered two hereof.

21

IV.

Because said complaint does not state facts sufficient to constitute a cause or causes of action.

V.

Because said first cause attempted to be set forth in said complaint does not state facts sufficient to constitute a cause or causes of action.

VI.

Because said second cause attempted to be set forth in said complaint does not state facts sufficient to constitute a cause or causes of action.

VII.

That said complaint is ambiguous, unintelligible and uncertain, in that no facts are stated from which it can be ascertained whether, at the time of the injuries and death of the therein mentioned Charles Albert Schuyler, he was upon the *the* therein mentioned train, and traveling in the therein mentioned car, upon business, or pleasure, personal to himself; or by virtue of his employment under the Government of the United States; nor whether or not the said decedent was then performing any service under said employment and, if so, the character or kind of service by him being engaged in, which permitted or required him to be upon said car.

Said second cause of action attempted to be set forth in said complaint is further ambiguous, unintelligible and uncertain in that it does not state who was the owner of the therein mentioned sum of money, to-wit: $727.00, nor who was the owner of the therein mentioned gold watch, chain, and fob of the value of $500.00; whether it was the property of said decedent, or of the United States of America, or some person or persons transmitting said money,

22 watch, chain, or fob, or any of them, by means of United States mail, over which the said decedent was the mere custodian, or otherwise, or at all.

Said second cause of action is further ambiguous, unintelligible and uncertain in that it cannot be ascertained from the averments

of said complaint whether or not the employment of decedent, or his duties, required the possession of said large sum of money; watch, chain, or fob, of the value of $500.00 to be in his possession, ownership or control as such employee of the Government of the United States, or whether it was required by said Government that said sum of money, watch, chain, or fob, or any thereof, of such value, should be possessed by said decedent as such employé, in the performance of any duty or service owing by said decedent to said Government of the United States, or to any other person or persons.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
Attorneys for Defendant.

I hereby certify the above demurrer is, in my opinion, well founded in point of law.

JOHN G. WILLIS,
Of Counsel for Defendant.

Received copy of the within, this 16th day of April, 1908.
AGEE & McCRACKEN,
Attorneys for Plaintiffs.

Endorsed on Back: Mary R. Schuyler et al. v. Southern Pacific Co. Demurrer. Second District Court, Weber County, Utah. Filed April 16, 1908. David Mattson, Clerk.

23 In the District Court of the Second Judicial District in and for the County of Weber, State of Utah.

MARY R. SCHUYLER et al., Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

The matters herein come on regularly for hearing on this day upon the demurrer of the defendant to the complaint of the plaintiffs, Messrs. Agee & McCracken appearing as counsel for the plaintiffs and C. R. Hollingsworth, Esq., of counsel, appearing as counsel for the defendants. Said demurrer is submitted to the court for its decision, without argument, and the court, in accordance with the rule of the court, thereupon overrules said demurrer and grants said defendant twenty days in which to answer, counsel for the defendant, then and there, in open court, waiving any and all notice of decision on said demurrer.

J. A. HOWELL, *Judge.*

Dated: May 23rd, 1908.

STATE OF UTAH,
County of Weber, ss:

I, David Mattson, Clerk of the District Court of the Second Judicial district in and for the county of Weber, State of Utah, do

hereby certify that the above and foregoing is a full, true
24 and correct copy of the order made and entered in the above entitled action on May 23rd, 1908, overruling the demurrer of the defendant to the complaint of the plaintiffs, as same appears on the minutes of said court.

Witness my hand and seal of said court hereto offixed this 20th day of August, A. D. 1908.

[SEAL.]

DAVID MATTSON, *Clerk*,
By GENET BINGHAM, *Deputy*.

25 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Answer.

Now comes the defendant and in answer to plaintiffs' complaint filed herein admits, denies and avers as follows, to-wit:

I. Defendant has no information or belief sufficient to enable it to answer the matters set forth in the first paragraph of the first cause of action of said complaint, and placing its denials on that ground, denies the same and the whole thereof; save and except it admits that the therein mentioned Charles Albert Schuyler died about the 14th day of January, 1907, in the State of Utah.

II. Defendant admits that it is and was a corporation organized and existing under the laws of the State of Kentucky engaged in the operation of a line of railroad extending from the city of San Francisco in the State of California, to the city of Ogden in the State of Utah, for the transportation of persons and property for hire, as averred in the second paragraph of said first cause of action of said complaint, and that contractual relations existed
26 between the defendant and the Government of the United States of America, with respect to the carrying of certain United States mail, and certain employés of said government to whom was entrusted the supervision and care of such mails as were by defendant transported under the agreement aforesaid, and that defendant received compensation therefor.

It denies each and every other allegation contained in said second paragraph of said first cause of action of said complaint.

III. Defendant admits that it operated many engines of great size and weight over its said lines of railroad. It denies each and every other allegation contained in the third paragraph of said first cause of action of said complaint, save and except it admits that the therein mentioned Charles Albert Schuyler received injuries in an accident at or near the station of Gartney, in the State of Utah, about the 14th day of January, 1907.

IV. Defendant admits that the said Charles Albert Schuyler was in the employ of the government of the United States. Denies that while in such employ and on duty, the duties of said Charles Albert Schuyler required him to ride on the trains of defendant, or on the mail cars thereof; that defendant is informed and believes, and upon its information and belief denies, that on the 14th day of January, 1907, the said Charles Albert Schuyler was riding in one, or any of the mail cars operated by defendant, either as in the complaint set forth, or at all while on duty, or in the performance of and discharge of his official duties, or in the employ or performance or discharge of any duty, between the points named in the complaint, or elsewhere, or at all. To the contrary, defendant is informed and believes, and so avers, that at the time and place charged, the said Charles Albert Schuyler was not on duty,
27 and had not been on the said day, and he then was, without the consent of this defendant, and without the payment of any fare, riding and traveling upon the said train for his own purposes unconnected with official duty or any duty. Defendant denies that on the 14th day of January, 1907, said Charles Albert Schuyler was in said, or any mail car attached to defendant's train of cars by any right or permission of defendant, or by any right whatever, and denies that he was engaged in the performance of his or any duties as such, or any, mail clerk, or any duty whatever. Admits that the said mail car on the train described was derailed; denies that the said Charles Albert Schuyler was killed without any fault on his part, or solely by reason of the negligence and want of care of defendant. To the contrary, defendant avers that at the time and place referred to the said Charles Albert Schuyler was on the said train by his own fault and without authority or permission.

Defendant denies each and every other allegation contained in said fourth paragraph of said first cause of action of said complaint, save and except such as have been in this paragraph admitted.

V. Defendant has no information or belief sufficient to enable it to answer the matter set forth in the fifth paragraph of said first cause of action of said complaint, and placing its denial upon that ground, denies the same and the whole thereof.

Defendant for and as its answer to the second cause of action attempted to be set forth in said complaint, and as its further defense thereto, says:

1. Defendant has no informationn or belief sufficient to enable it to answer the matters set forth in the first paragraph of the second cause of action of said complaint, and placing its de-
28 nials upon the ground, denies the same and the whole thereof; save and except it admits that the therein mentioned Charles Albert Schuyler died about the 14th day of January, 1907, in the State of Utah.

2. Defendant admits that it was and is a corporation engaged in the operation of a certain line of railroad.

It denies each and every other allegation contained in the second paragraph of said second cause of action of said complaint. De-

fendant admits that the said Charles Albert Schuyler was in the employ of the government of the United States. Denies that while in such employ and on duty, the duties of said Charles Albert Schuyler required him to ride on the trains of defendant, or on the mail cars thereof; that defendant is informed and believes, and upon its information and belief denies, that on the 14th day of January, 1907, the said Charles Albert Schuyler was riding in one, or any of the mail cars operated by defendant, either as in the complaint set forth, or at all while on duty, or in the performance of and discharge of his official duties, or in the employ or performance or discharge of any duty, between the points named in the complaint, or elsewhere, or at all. To the contrary, defendant is informed and believes, and so avers, that at the time and place charged, the said Charles Albert Schuyler was not on duty, and had not been on the said day, and he then was, without the consent of this defendant, and without the payment of any fare, riding and traveling upon the said train for his own purposes unconnected with official or any duty. Defendant denies that on the 14th day of January, 1907, said Charles Albert Schuyler was in said or any mail car attached to defendant's train of cars by any right or permission of defendant, or by any right whatever, and denies that he was engagede in the per-
29 formance of his or any duties as such, or any mail clerk, or any duty whatever. Admits that said mail car on the train described was derailed; denies that said Charles Albert Schuyler was killed without any fault on his part, or solely by reason of the negligence and want of care of defendant. To the contrary defendant avers that at the time and place referred to the said Charles Albert Schuyler was on the said train by his own fault and without authority or permission.

Defendant denies each and every other allegation contained in said third paragraph of said second cause of action of said complaint, save and except such as have been in this paragraph admitted.

IV. Defendant denies each and every allegation contained in the fourth paragraph of said second cause of action of said complaint.

Defendant further answering said complaint, and as its further defenses to the causes of action attempted to be set forth therein, says:

I.

That at the time of the happening of said accident, as mentioned and described in said complaint, the railroad track, as mentioned and described in said complaint, as to the place where said accident happened, was then and there, and for a long time prior thereto, had been, both as to construction and materials therein used, in perfect condition, the same being new and of recent construction, amply suitable for the use intended and made thereof. That the rails were of excessive weight for said purposes, and the ties were first class in every particular. That large sums of money and excessive quantities and qualities of work had been recently expended thereupon, far in excess of what was required in the operation of said line of
30 railroad and the prosecution of the defendant's business therein, and far in excess of what is ordinarily expended

upon railroad tracks of the same general kind and character, and far in excess of what is required for the operation of the character and size of the engine employed in handling said train at said time.

II.

Defendant further avers that it kept constantly employed at and in the vicinity of the place where said accident happened, a sufficient number of employés to properly maintain and keep in repair said line of railroad, and, in addition thereto, it had, from time to time, immediately prior to the happening of said accident, had extra men employed thereat, for the purpose of putting said line of railway in first class condition in every respect, and that said persons so employed performed their duties in that respect in every particular and that the said track was regularly and properly inspected, and that no defect of any kind or character was, or could be, discovered in the said line of railway for a long time prior to the happening of said accident, nor since the expenditure of said sums of money, labor and material thereupon, as aforesaid.

III.

Defendant further answering said complaint and as its further defense to the causes of action attempted to be set forth therein, alleges.

That it is informed and believes that the said Charles Albert Schuyler was employed by the government of the United States and assigned for duty in the Railway Postal Service thereof as assistant to the Chief Clerk at Ogden, Utah; that in order to enable him to perform the duties pertaining to said assignment he was permitted when engaged wholly in said service of said employer, and not otherwise, to be in and upon certain mail cars of de-
31 fendant used by it in transporting the United States mail; that contrary to said right and in violation of the agreement between said government of the United States and this defendant, and against its will, and without the consent and without the knowledge of said government of the United States, or of this defendant, and in violation of the statutes of the United States pertaining thereto, said Charles Albert Schuyler fraudulently, and with the intent and for the purpose of deceiving said government and this defendant, and for the purpose of avoiding the payment of fare, undertook to, and did wrongfully enter into and remain upon the train and cars of this defendant, and did fraudulently and in violation of said statutes and against defendant's will and without its knowledge and consent, and against the public policy of the State of Utah and of the United States of America, secure his transportation within said car and train, as described in said complaint, from the city of Ogden, Utah, to Oakland, California and return from said Oakland to said point of collision, and that in consequence of his said journey, fraudulent as aforesaid, and while violating the agreement between said government and this defendant, and in violation of the statutes of the United States pertaining thereto, and wrong-

fully on said train and cars as aforesaid, and not otherwise, said Charles Albert Schuyler received the injuries which resulted in his death.

Wherefore, having fully answered, defendant prays that the plaintiffs take nothing by this action, and that it have judgment against said plaintiffs for its costs in this action expended.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
Attorneys for Defendant.

STATE OF UTAH,
County of Salt Lake, ss:

W. H. Bancroft, being first duly sworn deposes and says: That he is an officer of the defendant, to-wit: the General Manager
32 thereof, and as such officer he makes this affidavit of verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

W. H. BANCROFT.

Subscribed and sworn to before me this 2nd day of June, 1908.
[SEAL.] L. B. SWANER,
Notary Public.

Service of the foregoing answer, together with the receipt of a copy thereof, is hereby acknowledged.

AGEE & McCRACKEN,
Attorneys for Plaintiffs.

Endorsed on back: Dist. Court and Judicial Dist. State of Utah, Weber County. Mary R. Schuyler, et al., plaintiffs, v. Southern Pacific Company, Defendant. Answer. Second District Court Weber County, Utah, Filed June 4, 1908. David Mattson, Clerk.

33 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

Instructions.

Plaintiffs hereby respectfully request the Court to give the following instructions:

Instruction No. 1.

I charge you that an Assistant Chief Clerk in the Railway Postal Service of the United States Government, employed and engaged

in the service of the Government, and traveling on a railroad train in his position under a contract between the Government and the carrier for the carriage of mail, and performing his duties as such assistant chief clerk on said train, is a passenger for hire, to whom the carrier owes the same duty that it does to passengers riding in the passenger cars, so far as its liability for personal injuries arising from its negligence is concerned.

(Endorsed:) Given with addition and insertions. J. A. Howell, Judge.

34 Instruction No. 2.

It is undisputed that the deceased, Charles Albert Schuyler, was, at and prior to the time of his injury and death, an employee in the Railway Mail Service of the United States, and that at the time of his injury and death he was in one of the railway mail cars on the defendant's line of road, and I charge you that the presumption is that he was there lawfully and rightfully and in the discharge of his official duties as such employee, and the burden is on the defendant to overcome that presumption, by affirmative proof and by a preponderance of all the evidence.

(Endorsed:) Given with addition. J. A. Howell, Judge.

Instruction No. 3.

I charge you that the answer in this case admits the derailment of the train and car upon which the decedent was riding. This admission raises a presumption of the negligence of the defendant, and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from improper construction of the track, failure to keep the track in proper repair, or negligence in operation. Whenever a train or car leaves the track, the presumption is that either the track, or some portion thereof, was not in proper condition, or that the train was not skillfully or properly operated, and that the railroad company, whose duty it is to keep the track in proper condition, and to operate its trains with the necessary prudence and care, has in some respect violated its duty, and been guilty of negligence.

(Endorsed.) Given. J. A. Howell, Judge.

35 Instruction No. 4.

I charge you that while a common carrier of passengers is not an insurer of the safety of its passengers, the rule is firmly established that it is bound to use the utmost care, so far as human skill and foresight can go, to guard against the possibility of accidents arising from the condition of its road and the operation of its cars, and the transportation of passengers, and for any negligence in the discharge of these obligations, even in the slightest degree, which

results in injury to a passenger, the Railway Company is liable in damages.

(Endorsed:) Refused, because covered by another instruction. J. A. Howell, Judge.

Instruction No. 5.

I further charge you that every person riding in a railroad car is presumed to be there lawfully, and the burden is upon the carrier to show affirmatively, and by a preponderance of all the evidence, that he was a trespasser.

(Endorsed:) Refused, because covered by other instructions. J. A. Howell, Judge.

36 Instruction No. 7.

If, under the evidence and these instructions, you shall find that the plaintiffs are entitled to recover in this action, then I charge you that they are entitled to recover such damages as may be just, under all the circumstances, and such as will compensate them for the loss sustained through the death of the deceased, Charles Albert Schuyler. In arriving at such damages you are not to consider the sorrow, grief, bereavement or mental sufferings of the widow and children of the deceased, nor to give any damages in consideration therefor. You are only to consider and estimate the pecuniary or money loss sustained by the plaintiffs as the heirs of the deceased, in consequence of his death, but in estimating this pecuniary loss you may take into consideration the loss of care, comfort, association and society, if any, which the plaintiffs, as the widow and children of said deceased, have sustained by his death. You can take into consideration the age and probable duration of life of the deceased, his ability to earn wages and to provide for his wife and children, and you may determine what the deceased would likely have done for them had he lived, taking into consideration the uncertainty of health and of life itself, and from the amount so ascertained deduct the amount of money or means the deceased would naturally and reasonably expend upon himself for his own living, including all his reasonable expenses of food, clothing and other incidental and natural expenses, and also make a proper and reasonable allowance for the time he might reasonably be expected to be idle or out of employment. You should also take into consideration the ages of the widow and children of the deceased dependent upon him for support, and from all these facts and circumstances determine the amount or sum in money which will fairly and justly compensate them for the loss which they have sustained through the death of the said deceased.

(Endorsed:) Given with addition. J. A. Howell, Judge.

37 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER et als., Plaintiffs,
vs.
SOUTHERN PACIFIC COMPANY, Defendant.

Defendant's Request for Instructions.

No. 1.

Gentlemen of the Jury, the Court instructs you that the plaintiffs are not entitled to recover in this case; and your verdict therefore, will be for the defendant.

(Endorsed:) Refused. J. A. Howell, Judge.

38 No. 2.

You are instructed that the Act of Congress as amended June 29, approved June 30, 1906, commonly called the Hepburn Act, among other things provides:

"No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service Employés, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two

thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

(Endorsed:) Refused. J. A. Howell, Judge.

No. 3.

You are therefore instructed that if you find from the testimony in this case that Charles Albert Schuyler, at the time of the accident in which he received the injuries from which he thereafter died, had made the journey from Ogden to San Francisco to attend the funeral of his child, or on any other personal business of the said decedent's, and while returning therefrom received the injuries in question from which he thereafter died, then the plaintiffs, and each thereof, would be precluded from recovering in this case, and your verdict should be for the defendant.

(Endorsed:) Refused. J. A. Howell, Judge.

39 No. 4.

The Court instructs you that the commission issued by the Government to said Charles Albert Schuyler, and upon which he was riding at the time of the accident complained of, was a request on the defendant company made by the Government to transport said Schuyler only when he was engaged wholly in the performance of his official duties, and not otherwise; and if you find from the testimony that said Schuyler was using said commission, as an evidence of his right to transportattion, while traveling solely for his own purposes, unconnected with any official duties, then he was violating the provisions of the Act of Congress above referred to, and the plaintiffs cannot recover in this action.

(Endorsed:) First part refused; last part given. J. A. Howell, Judge.

No. 5.

You are instructed that neither the conductor of the train nor any of the officers or agents of the railroad company could authorize or permit the said Charles Albert Schuyler to ride on its trains, when not on duty, without paying the regular and full fare charged in its tariffs for like transportation of other persons.

(Endorsed:) Refused. J. A. Howell, Judge.

40 No. 6.

You are instructed that the mere happening of the accident nor the resulting death of said Charles Albert Schuyler creates no presumption of negligence on the part of the defendant.

(Endorsed:) Refused. J. A. Howell, Judge.

No. 7

You are instructed that negligence is never presumed. That before the plaintiffs would be entitled to recover in this case they must prove by a fair preponderance of the testimony that the defendant was guilty of negligence in one or more of the particulars stated in the complaint.

(Endorsed:) Refused. J. A. Howell, Judge.

No. 8.

You are instructed that before the plaintiffs would be entitled to recover in this case, you must, among other things mentioned in these instructions, find from the testimony the defendant to have been guilty of negligence in the construction or maintenance of its railroad track, or in the operation of its trains, at the place and time of the reception of the injuries by said decedent.

(Endorsed:) Given with addition. J. A. Howell, Judge.

41

No. 9.

You are instructed that a railroad company does not warrant safe carriage for persons, but that its duty as a common carrier of persons is discharged when it uses the highest degree of care in the selection of its appliances, including its railroad track, and the materials that enter into the construction thereof and of its railway cars and engines and other appliances, and a like degree of care in the selection of its employés and in the operation of its trains and cars.

(Endorsed:) Given. J. A. Howell, Judge.

No. 10.

If you find for the plaintiffs and reach a point in your deliberations with respect to the amount of damage plaintiffs are entitled to, it is proper that you should understand the precise nature of the case which you are trying. The action before you is purely a statutory action. It is brought by these plaintiffs, as heirs at law, to recover damages from the defendant because of the death of the deceased. It is an entirely different and independent action from an action which Charles Albert Schuyler himself might have brought for damages for personal injuries, if instead of losing his life in the accident he had received personal injuries which did not involve his death. Such action on the part of Charles Albert Schuyler was extinguished by his death and ceased to exist. The present action brought by plaintiffs is a new and independent action and rests upon its own footing.

In this action now before you, no damages can be recovered by the plaintiffs for any pain or suffering of body which Charles Albert

Schuyler may have experienced as a result of his injuries,
42 nor can any damages be given in this case for any grief of sorrow or injury to the feelings, or pain or distress of mind which may have come upon Charles Albert Schuyler as a consequence of his injuries. Those things are no part of this case and damages cannot be given for them in this trial. [Moreover, you have no right to take into consideration in fixing the amount of damages, any personal grief or mental distress or wounded feelings which any of these plaintiffs may have experienced by reason of *his* death of Charles Albert Schuyler. The sorrow and grief that his death may have caused plaintiffs are not regarded by the law as proper things to be considered in a verdict for damages, and nothing can be added by way of damages on that account.]

(Endorsed:) Given except that portion in brackets which point is covered elsewhere in the instructions. J. A. Howell, Judge.

No. 11.

In determining the amount of damages if any in a case like this with reference to the earning capacity of the deceased, the jury will understand that the calculation is not to be made upon the basis of the total amount of the probable earnings, but only upon such portion of those earnings as would probably have gone to the benefit of the plaintiffs in this case if the deceased had lived and acquired such earnings, but when you determine what percentage or proportion of the probable earnings would have gone to the benefit of these plaintiffs you have no right to award them in your verdict now the sum total that such proportion would amount to at the end of the deceased's expectancy. All that the plaintiffs would be entitled to in the verdict so far as his future earn-
43 ings and contributions go to constitute damages, would be the present value of what would amount to such total sum at the end of such expectancy. You will consider all the evidence in the case to determine what such present value would be, and you must not award anything in excess of such present value.

The measure of damages for the loss of human life, resulting from negligence (so far as future earnings and contributions go to constitute damages) is the present value of the contributions made by the deceased to the beneficiaries, ascertained by deducting the cost of his living and expenditures, from his gross income, and no more can be allowed than the present worth of accumulations arising from such net income based upon the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated and capitalized, and no more than the present worth thereof can be awarded in damages.

(Endorsed:) Given.

No. 12.

If you find for the plaintiffs and reach a point in your deliberations with respect to the amount of damages plaintiffs are entitled to, I instruct you that the defendant is entitled to have you

consider upon the question of the probable value of the decedent's life, the uncertainty of life itself, the uncertainty of health and the uncertainty of constant employment. It is your duty to take these elements into consideration.

I further instruct you that in considering the probable value of the life of Charles Albert Schuyler to these plaintiffs, you have no right to take into consideration any possible opportunity that he might have had of acquiring wealth or fortune in the future by change of circumstances in life.

(Endorsed:) Given in other language. (On margin of first paragraph.) Refused. (On margin of second paragraph.) J. A. Howell, Judge.

44 No. 13.

Sometimes in actions for damages the law permits the amount to be increased by what are called exemplary or punitive damages, that is to say, where a defendant has been guilty of oppression by fraud or malice actual or presumed, the jury in addition to the actual damages may give damages for the sake of example and by way of punishing the defendant.

Understanding now, what exemplary damages are, I say to you as a matter of law that you have no right in this case within the meaning of such damage to make an example of this defendant or to assess any sum against the defendant by way of punishing the railroad company. [As a matter of law I instruct you that you have no right to give any exemplary damages whatever in this case against the defendant and it is your duty to bear this instruction carefully in mind.]

(Endorsed:) Given except the last sentence. J. A. Howell, Judge.

No. 14.

If you find for the plaintiffs and reach a point in your deliberations with respect to the amount of damages plaintiffs are entitled to, the court charges you that the circumstance that the Southern Pacific Company is a railroad corporation must in no wise affect your verdict in this case any more than if the defendant were an ordinary private citizen. In a court of justice like this jurors should make no difference between a corporation and an individual. These plaintiffs and this railroad company are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that this corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recoverable under the rules of law that any verdict can be rendered against this defendant.

(Endorsed:) Given. J. A. Howell, Judge.

45 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER et al., Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

Motion.

The defendant moves the Court to direct the jury in this case to find a special verdict, in writing, upon the issues submitted — said jury; and likewise moves the Court to submit to said jury the following questions, in writing, for their verdict and answer thereto, in writing:

1. Was the journey of the deceased, Charles Albert Schuyler, from which he was returning at the time of the accident, made by him to attend the funeral of his child?

2. Was the deceased, on said journey to and from San Francisco, engaged wholly in the performance of his official duties?

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
E. M. BAGLEY,
Attorneys for Defendant.

(Endorsed:) 1. Refused for the same reason as defendant's request # 3. That, also, there is no occasion in this case for submitting special interrogatories. 2. Refused for the same reason as the first part of defendant's request # 4 is refused. J. A. Howell, Judge.

46 In the District Court of the Second Judicial District of the State of Utah, County of Weber.

2690.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,
vs.
SOUTHERN PACIFIC COMPANY, Defendant.

Instructions to Jury.

Gentlemen of the Jury:

1.

The court charges you that an assistant chief clerk in the railway postal service of the United States government, employed and en-

gaged in the service of the government, if traveling on a railroad train in his position under contract between the government and the carrier for the carriage of mail, and if performing his duties thereon as such assistant chief clerk on said train, is a passenger for hire, to whom the carrier owes the same duty that he owes to passengers traveling in passenger cars, so far as its liability for personal injury arising from its negligence is concerned; but the Court charges you that an assistant chief clerk in the railway mail service employed and engaged in the service of the government, if traveling in a railroad train, not in his position under contract between the government and the carrier for the carriage of mail and not performing any of his duties as such assistant chief clerk on said train, but traveling solely for his own purposes, unconnected with any official duties, would not be a passenger for hire, but on the contrary a trespasser, to whom the carrier would not be liable for any such negligence as that with which the defendant herein is charged.

47 2.

It is undisputed that the deceased, Charles Albert Schuyler, was at and prior to the time of his injury and death an employé of the railway mail service *on* the United States and that at the time of his injury and death he was in one of the railway mail cars on the defendant's line of road, and I charge you the presumption is that he was there lawfully and rightfully in the discharge of his official duties as such employé and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, but the Court charges you that such presumption would be overcome if by affirmative proof and by a preponderance of the evidence you are convinced that the said Charles Albert Schuyler, at the time of his injury and death on one of the railway mail cars of the defendant's line of road, was not there in the discharge of his official duties as an employé of the railway mail service, but that while traveling on the defendant's railroad train at said time and place he was traveling solely for his own purposes, unconnected with any official duty.

3.

The Court charges you that if you find that the plaintiffs' intestate Charles Albert Schuyler, was, within the meaning of the definition heretofore given you, a trespasser at the time of his injury and death upon said defendant's railroad train, then the Court charges you that under no circumstances would the plaintiffs be entitled to recover in this action, but if you find from the testimony that the said Charles Albert Schuyler was a passenger within the meaning of the definition heretofore given you, then the Court charges you that before the plaintiffs would be entitled to recover in this action, you must find from the testimony that the defendant was guilty of negligence in the construction or maintenance of its railroad track, or in the operation of its railroad trains at the place and time
48 of the reception of the injuries by said decedent. If you find that the deceased, Charles Albert Schuyler, was at the time

and place in question herein a passenger on defendant's line of railroad, within the purview of the instructions heretofore given, then, in determining the question as to whether or not the defendant was guilty of negligence as heretofore set out, you are instructed that the answer in this case admits the derailment of the car upon which the decedent was riding, and that this admission raises the presumption of the negligence of the defendant and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from the improper construction of the track, failure to keep the track in proper repair, or negligence in operation. Whenever a train or car leaves the track, the presumption is, in an action brought by a passenger, that either the track or some portion thereof was not in proper condition, or that the train was not skillfully or properly operated, or that the railroad company, whose duty it is to keep the track in proper condition to operate its trains with prudence and care, has in some respect violated its duty and been guilty of negligence.

You are instructed that the railroad company does not warrant the safe carriage of persons, but that its duty as a common carrier of persons is discharged when it uses the highest degree of care in the selection of its appliances, including its railroad track and the material entering into the construction thereof, the railroad cars, engines, and other appliances, and a like degree of care in the selection of its employés and in the operation of its trains.

4.

You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. By a preponderance of the
49 evidence is meant the greater weight of the evidence, that which is the more convincing of its truth. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest, or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements; their apparent frankness or candor or want of it, in view of all other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

5.

If you find for the plaintiffs and reach a point in your deliberations with respect to the amount of damages plaintiffs are entitled to, it is proper that you should understand the precise nature of the case which you are trying. The action before you is purely a statutory action. It is brought by these plaintiffs, as heirs at law, to recover damages from defendant because of the death of the deceased. It is an entirely different and independent action from an action which Charles Albert Schuyler himself might have brought

for damages for personal injuries, if instead of losing his life in the accident he had received personal injuries which did not involve his death. Such action on the part of Charles Albert Schuyler was extinguished by his death and ceased to exist. The present action brought by plaintiffs is a new and independent action and rests upon its own footing.

In this action now before you, no damages can be recovered by the plaintiffs for any pain or suffering of body which Charles Albert Schuyler may have experienced as a result of his injuries, nor can any damages be given in this case for any grief or sorrow or injury to the feelings, or pain or distress of mind which may have come upon Charles Albert Schuyler as a consequence of his injuries. Those things are no part of this case and damages cannot be given for them in this trial.

50 6.

If, under the evidence and these instructions, you shall find that plaintiffs are entitled to recover in this action, then I charge you that they are entitled to recover such damages as may be just, under all the circumstances, and such as will compensate them for the loss sustained through the death of the deceased, Charles Albert Schuyler. In arriving at such damages you are not to consider the sorrow, grief, bereavement or mental sufferings of the widow and children of the deceased, nor to give any damages in consideration therefor. You are only to consider and estimate the pecuniary or money loss sustained by the plaintiffs as the heirs of the deceased, in consequence of his death, but in estimating this pecuniary loss you may take into consideration the loss of care, comfort, association and society, if any, which the plaintiffs, as the widow and children of said deceased, have sustained by his death. You can take into consideration the age and probable duration of the life of the deceased, his ability to earn wages and to provide for his wife and children, and you may determine what the deceased would likely have done for them had he lived, taking into consideration the uncertainty of health and of life itself, and from the amount so ascertained deduct the amount of money or means the deceased would naturally and reasonably expend upon himself for his own living, including all his reasonable expenses of food, clothing and other incidental and natural expenses, and also make a proper and reasonable allowance for the time he might reasonably be expected to be idle or out of employment. You should also take into consideration the ages of the widow and children of the deceased dependent upon him for support, and from all these facts and circumstances determine the amount or sum in money which will fairly and justly compensate them for the loss which they have sustained through the death of the said deceased.

51 7.

In determining the amount of damages if any in a case like this with reference to the earning capacity of the deceased, the jury will understand that the calculation is not to be made upon the basis of

the total amount of the probable earnings, but only upon such portion of those earnings as would probably have gone to the benefit of the plaintiffs in this case if the deceased had lived and acquired such earnings, but when you determine what percentage or proportion of the probable earnings would have gone to these plaintiffs you have no right to award them in your verdict now the sum total that such proportion would amount to at the end of deceased's expectancy. All that the plaintiffs would be entitled to in the verdict so far as his furture earnings and contributions go to constitute damages, would be the present value of what would amount to such total sum at the end of such expectancy. You will consider all the evidence in the case to determine what such present value would be, and you must not award anything in excess of such present value.

The measure of damages for the loss of human life, resulting from negligence, so far as future earnings and contributions go to constitute damages, is the present value of the contributions made by the deceased to the beneficiaries, ascertained by deducting the cost of his living and expenditures, from his gross income, and no more can be allowed than the present worth of accumulations arising from such net income based upon the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated and capitalized, and no more than the present worth thereof can be awarded in damages.

52 8.

Sometimes in actions for damages the law permits the amount to be increased by what are called exemplary or punitive damages, that is to say, where a defendant has been guilty of oppression by fraud or malice actual or presumed, the jury in addition to the actual damages may give damages for the sake of example and by way of punishing the defendant.

Understanding now, what exemplary damages are, I say to you as a matter of law that you have no right in this case within the meaning of such damages to make an example of this defendant or to assess any sum against the defendant by way of punishing the railroad company.

9.

If you find for the plaintiffs and reach a point in your deliberations with respect to the amount of damages plaintiffs are entitled to, the Court charges you that the circumstance that the Southern Pacific Company is a railroad corporation must in no wise affect your verdict in this case any more than if the defendant were an ordinary private citizen. In a court of justice like this jurors should make no difference between a corporation and an individual. These plaintiffs and this railroad company are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that this corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recover-

able under the rules of law that any verdict can be rendered against this defendant.

10.

You should accept the instructions of the Court and be governed by them as to the law of the case.

53 11.

You are the sole judges of the facts, of the credibility of the witnesses, and of the weight of the evidence.

The Court further instructs you that six of your number must agree upon a verdict. That is to say, six of your number may find a verdict in favor of the plaintiffs and assess their damages, or six of your number may find a verdict for the defendant, no cause of action.

When you have retired to your jury-room you will select one of your number as foreman, and when you have agreed upon your verdict let the foreman sign it and return it into court. Should six or seven only of your number be able to agree upon a verdict, then all such agreeing jurors should sign the verdict.

In this case there are two forms of verdict, one in favor of the plaintiffs and assessing their damages, and the other is in favor of the defendant, "no cause of action."

I have dated and signed these instructions and you may take them with you to your jury-room for further consideration, but I request that you return them with your verdict, so that they may be filed in the case as required by law.

Dated: August 20th, 1908.

(Signed) J. A. HOWELL, *Judge.*

54 In the District Court of the Second Judicial District in and for the County of Weber, State of Utah.

Hon. J. A. Howell, Judge.

MARY R. SCHUYLER & REA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler and Dorothy Schuyler, Infants, by Jno. M. Forristall, Their G'd'n ad Litem, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

Judgment on Verdict in Open Court.

20th Day of August, A. D. 1908.

This action came on regularly for trial. The said parties appeared by their attorneys, Messrs. Agee & McCracken, counsel for plaintiffs, and Jno. G. Willis, Esq., and C. R. Hollingsworth, Esq., counsel for defendant. A jury of eight persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff * * *

and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into Court, and being called, answered to their names, and on their oaths say: "We, the jury empaneled in the above entitled action, find the issue joined in the first cause of action in favor of the plaintiffs and against the defendant, Southern Pacific Company, and assess their damages in the sum of Nine Thousand ($9,000.00) Dollars, J. J. Brummitt, Foreman."

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that said plaintiffs do have and recover of and from said defendant, Southern Pacific Company, the sum of Nine Thousand and 00/100 ($9,000.00) Dollars, together with their costs and disbursements incurred in this action, amounting to the sum of forty-six and 05/100 ($46.05) Dollars.

Judgment recorded the 17th day of December, A. D. 1908.
55 Judgment record "8" page "21."
Judgment docket "3" page "254."

In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

No. 2690. Certificate.

MARY R. SCHUYLER et al., Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, Defendant.

STATE OF UTAH,
County of Weber, ss:

I, the undersigned, Clerk of the District Court of the Second Judicial District, of the State of Utah, County of Weber, do hereby certify that the foregoing is a true copy of the Judgment rendered in the above entitled action, and recorded in Judgment Book Eight of said Court at page 21.

And I further certify that the foregoing papers hereto annexed, constitute the Judgment Roll in said action.

In witness whereof, I have hereunto set my hand and affixed my official seal this 20th day of August, A. D. 1908.

[SEAL.] DAVID MATTSON, *Clerk.*
By HARRY HALES,
Deputy Clerk.

56 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER, and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Notice of Intention to Move for New Trial.

To Agee & McCracken, and —— Schlesinger, Attorneys for Plaintiffs:

Please take notice, That the defendant, the Southern Pacific Company, intends to move the court to vacate and set aside the verdict rendered and the judgment made and entered in said cause, and to grant a new trial thereof, for the reasons, and upon the grounds following:

1. Irregularity in the proceedings and by the adverse party; and abuse of discretion by the court, in each of which the defendant was prevented from having a fair trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of evidence to justify the verdict, or to sustain the judgment.

4. That the said verdict and the said judgment are against law.

57–62 5. Errors in law occurring at the trial, and expected to by the defendant.

Said motion will be made upon the papers, pleadings, and files in said cause, upon the minutes of said court made and entered therein, and upon affidavits to be hereafter served and filed, and upon bill of exceptions hereafter to be prepared.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
Attorneys for Defendant.

Service of the above, and the receipt of a copy hereby acknowledged, this 24th day of Aug. 1908.

AGEE & McCRACKEN,
Att'ys for Plaintiffs.

Endorsed on Back: Second District Court, Weber County, Utah. Filed Aug. 24, 1908. David Mattson, Clerk.

* * * * * * *

63 In the District Court of the Second Judicial District in and for the County of Weber, State of Utah.

#2960.

MARY R. SCHUYLER et al., Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

The motion of the defendant for a new trial of this action having been submitted to the court for its decision, and by the court taken under advisement, now on this day comes the court and being sufficiently advised, it is ordered that said motion for a new trial be, and the same is hereby denied.

Dated: January 4th, 1909.

J. A. HOWELL, *Judge.*

STATE OF UTAH,
County of Weber, ss:

I, Samuel G. Dye, Clerk of the above entitled court, hereby certify that the above and foregoing is a full, true and correct copy of the order made and entered in the above entitled action on January 4th, 1909, denying the motion of the defendant for a new trial of this action, as the same appears upon the minutes of said court.

Witness, my hand and seal of said court hereto affixed this 2nd day of April, A. D. 1909.

[SEAL.] SAMUEL G. DYE, *Clerk.*

64 & 65 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER and RHEA SCHUYLER*ft* EDWARD SCHUYLER, Vera Schuyler, and Dorothoy Schuler, Infants, by John M. Forristall, Their Guardian and Litem, Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

Bill of Exceptions.

Appearances:

For the Plaintiffs: Messrs. Agee & McCracken and Bert Schlesinger, Esq.

For the Defendant: John G. Willis, Esq., E. M. Bagley, Esq., and C. R. Hollingsworth, Esq.

66 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Petition for Removal.

Your petitioner, the Southern Pacific Company, a corporation, organized, created and existing under and by virtue of the laws of the State of Kentucky, doing business in the State of Utah, under and by virtue of the laws of said State, pertaining to foreign railroad corporations, respectfully shows this court that the matter and amounts in dispute in the above entitled suit exceeded, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000.00), and that said suit is of a civil nature.

That the defendant in the above entitled cause is a corporation, as aforesaid, having its principal office and place of business within the state of Utah, at the City of Ogden; and it was at the time of the commencement of this suit, and still is, a resident of, and a citizen of the said State of Kentucky; that the plaintiffs in the above entitled cause are, and each thereof, were, at the time of the commencement of this suit, and still are, citizens and residents of the County of Alameda, State of California.

67 That the suit herein is of a civil nature at law, arising under the constitution and laws of the United States, Section VIII of Article I, declaring that Congress shall have power to 'establish postoffices and post roads"; also "to regulate commerce with foreign nations and among the several States." Also, under the Act of Congress of the United States, approved June 13th, 1898, and June 9th, 1896, and acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and other officers of the postoffice department of the Government of the United States; also the act of March 3rd, 1887, pertaining to messenger service in connection with railroads, etc.; also Act of Congress of the United States, approved February 4th, 1887, and Acts amendatory thereof, including the act approved June 29th, 1906.

Your petitioner shows that the controversy herein arises from the following facts, as shown by the complaint filed herein: That the Southern Pacific Company was, at all the times mentioned in the said complaint, a corporation, as aforesaid, and as such was engaged in operating a line of railroad into and through the States of Utah, Nevada and California, and among other things, was engaged in transporting United States mail from San Francisco, in the State of California, to Ogden, in the State of Utah, and, as incident thereto, certain employés of the Government of the United States, in the nature of mail clerks, attended the transportation of said mail as

such employés of said Government. That about the 14th day of January, 1907, one Charles Albert Schuyler, as an employé of said United States Government, in the said railway mail service, whilst riding upon one of the cars forming the consist of one of defendant's trains, then being operated over said line of railroad between said points, received injuries from which he thereafter died. That at the time of the death of the said Charles Albert Schuyler. he had
68 in his possession a large sum of money, to-wit: Seven hundred and thirty-seven dollars ($737.00), and in addition thereto, a certain gold watch, chain and watch fob, of the value of five hundred dollars ($500.) which said deceased had and possessed on and about his person while occupying a position in a certain car allotted by said Southern Pacific Company for the transportation of said United States mail. That each and every of said sum of money, watch, chain and fob, were totally destroyed and lost as a result of the accident wherein said defendant received the injuries aforesaid.

Your petitioner offers herewith good and sufficient sureties for its entering in the Circuit Court of the United States for the District of Utah, on the first day of its next session, a copy of the record in this suit; and for paying all costs that may be awarded by said Circuit Court, if said Court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said sureties and bond, and to cause the record herein to be removed into said circuit court of the United States, in and for the District of Utah; and it will ever pray.

SOUTHERN PACIFIC COMPANY,
By JNO. G. WILLIS, *Its Attorney.*

Marked Filed April 16, '08.

69 *Order.*

2690.

MARY R. SCHUYLER et al.
v.
SOUTHERN PACIFIC COMPANY.

On this day the matters herein came on regularly for hearing upon the petition of the defendant company for the removal of this cause to the Circuit Court of the United States in and for the district of Utah, C. R. Hollingsworth, Esq., of counsel, appearing as counsel for the defendant company, and A. W. Agee, Esq., appearing as counsel for the plaintiff-. The matter being submitted to the court for its decision without argument is by the court denied on the ground that the Circuit Court of the United States for the District of Utah has no jurisdiction in said action, that the said cause is not removable, and this court declines to make an order removing

said cause to the circuit court of the United States or to relinquish its jurisdiction.

Saturday, May 9th, 1908.

70 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that the above entitled action came on regularly for trial at Ogden City, Weber County, Utah, on Monday, August 17, 1908, at 9:30 o'clock A. M., before Hon. J. A. Howell, Judge of the District Court of the Second Judicial District of the State of Utah, in and for Weber County, with a jury, Messrs. Agee & McCracken and Bert Schlesinger, Esq. appearing as counsel for the plaintiffs and John G. Willis, Esq. and C. R. Hollingsworth, Esq. appearing as counsel for the defendant.

On motion of John G. Willis, Esq., of counsel for the defendant, E. M. Bagley, Esq. was entered as associate counsel for the defendant.

71 At 3:40 P. M., a jury having been accepted and sworn to try the cause, Mr. Agee stated the case for the plaintiffs, as follows:

Mr. AGEE: At this time we offer in evidence the order signed by your Honor appointing Mr. Forristall guardian ad litem.

Mr. BAGLEY: We object, if your Honor please, to the introduction of the order, on the ground that it is inadmissible for the reason that under the laws of this state there is no authority for the appointment of a guardian litem for non-resident minor plaintiffs, the only authority which can be found in the statutes of Utah upon that subject pertains absolutely and clearly to the appointment of guardians ad litem for non-resident defendants, in order that they may be sued here, but there is no authority to be found in the statute for the appointment of guardian ad litem for non-resident plaintiffs. In that respect the law of Utah is as it was at common-law, it remains unchanged by any statute, and at common-law, as the court knows, a guardian ad litem could not be appointed for minor plaintiffs, non-resident minor plaintiffs. Section 2908, subdivision 3.

Mr. SCHLESINGER: I suggest, if your honor please, that it be admitted provisionally, so as to save time. If it has no proper place in the record, of course it can be stricken out.

Mr. BAGLEY: I don't see how the action can proceed if it is not properly brought.

Argument.

72 The COURT: I think, gentlemen, I will overrule the objection at this time, and of course reserve the right later to change my ruling.

Mr. BAGLEY: Do I understand that the Court rules so far as the second cause of action is concerned?

The COURT: I am rather inclined to think that a more general objection will be made, then I will pass upon them both. It may be overruled and you may have the benefit of your exception.

Mr. AGEE: While it might not be admissible on one cause of action, it might be on the other.

Mr. SCHLESINGER: We offer it now with respect to the first cause of action.

Mr. BAGLEY: May we have an objection and exception that is directed both to its applicability to the first and the second causes of action?

The COURT: Yes, I think it may be so understood.

Mr. BAGLEY: And overruled as to both?

The COURT: At this time I am pretty certain I will not change my ruling as to the first cause of action, but I might as to the second.

Mr. AGEE: I don't understand when I offer evidence that objection can be made to it as to one cause of action or as to another cause of action. If it is admissible at all, it is admissible and the Court will control it by instructions when we come to that, if we see proper to proceed. In all probability we will dismiss the second cause of action and not ask to be heard upon that. We find it very difficult to make our proofs as to the loss of the money and so forth any way. May I read this into the record?

The COURT: Yes.

Said order appointing guardian ad litem was thereupon marked by the stenographer as Plaintiffs' Exhibit "A" and was read by Mr. Agee as follows:

73 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

In the Matter of the Appointment of Guardian ad Litem of RHEA SCHUYLER, EDWARD SCHUYLER, VERA SCHUYLER and DOROTHY SCHUYLER, Minors.

Order Appointing Guardian ad Litem.

Upon the presentation of the verified petition of Mary R. Schuyler, praying for the appointment of John M. Forristall as guardian ad litem of Rhea Schuyler, Edward Schuyler, Vera Schuyler and Dorothy Schuyler, minors, and it appearinng to me that the said Rhea Schuyler, Edward Schuyler, Vera Schuyler and Dorothy Schuyler are the minor children of said Mary R. Schuyler, and that said Rhea Schuyler is an infant under the age of twenty-one years, to wit, the age of eleven years, Edward Schuyler is an infant under the age of twenty-one years, to wit, the age of nine years,

Vera Schuyler is an infant under the age of twenty-one years, to wit, the age of seven years, and Dorothy Schuyler is an infant under the age of twenty-one years, to wit, the age of five years; and that said petitioner and said minors are desirous of beginning an action at law against the Southern Pacific Company to recover damages for the death of Charles Albert Schuyler, husband of said petitioner and father of said minor children, arising on account of the negligence of the Southern Pacific Company; and that the said John M. Forristall is a resident of the County of Weber, State of Utah, over the age of twenty-one years and a competent and suitable person to act as guardian ad litem of said four minor children:

It is ordered, that the said John M. Forristall be, and he is hereby appointed guardian ad litem for the said Rhea Schuyler,
74 Edward Schuyler, Vera Schuyler and Dorothy Schuyler, minors, with full authority to commence and prosecute in this court an action or actions on behalf of the said minors and against any person or persons, corporation or corporations, as he may deem advisable to recover a judgment for damages for injuries resulting in the death of said Charles Albert Schuyler on account of the alleged negligence of any person or persons, corporation or corporations, with full power to employ attorneys to represent him and the said minors in any such action or actions which may be brought as aforesaid.

Done this 27th day of March, A. D. 1908.

J. A. HOWELL, *Judge.*

Filed March 27, 1908.

DAVID MATTSON, *Clerk.*

Mr. WILLIS: I want to urge the further objection, if your Honor will consider it as having preceded your Honor's ruling?

The COURT: Oh, certainly.

Mr. WILLIS: To the effect that the Court is without authority. Is that the action of the Court or the Judge?

Mr. AGEE: It is the action of the Judge.

Mr. WILLIS: Now I make the further point that the Court is without authority to appoint a guardian ad litem of this or any kind or character prior to the institution of the action, the record showing the action to have been begun on the 6th day of April, I believe, succeeding the order.

Mr. AGEE: Of course if that was the rule, a plaintiff could never get into court, because he couldn't bring the action without a guardian.

Mr. WILLIS: It is a suggestion of infancy and the cause must be pending. I want to inquire of the jurisdiction, what is it gives the authority? Probate jurisdiction is special and there is no
75 jurisdiction of the district court that gives any authority for the action in question, some proceeding must be pending in the court.

The COURT: Well, I will overule that objection. The practice has been so contrary to that, that off-hand I don't want to rule against it.

Mr. WILLIS: Note an exception.

The COURT: The practice always has been to ask for the appointment prior to the beginning of the action, and in fact the statute says they can only appear in court by their guardian ad litem.

Mr. SCHLESINGER: It is admitted by counsel for the defendant—[Mr. Bagley, if you will step around here and see if I read this correctly], that in the month of November, 1906, there was issued to Charles Albert Schuyler a commission in due and regular form by the postoffice department, under the authority of the postmaster general of the United States, reading as follows:

"POSTOFFICE DEPARTMENT, WASHINGTON, D. C.

To Whom Concerned:

The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk railway mail service with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the second assistant postmaster general and countersigned by James E. White.

G. B. CORTELYOU.

Countersigned:

JAMES E. WHITE,
General Superintendent."

Then followed a blank space, in which was the photograph of Mr. Schuyler, and then these words following:

"Good between all stations Utah, Idaho, Nevada, California, Montana and Colorado."

76 Counsel also admit that Mr. Schuyler held this commission up to the time of his death, as alleged in the complaint, and that the commission was destroyed or cancelled after his death by the postoffice department at Washington, D. C. in the latter part of 1907, is that right, Mr. Bagley?

Mr. BAGLEY: Yes; and counsel for the plaintiffs admit—it is admited that the deceased Schuyler was riding on this commission on this trip at the time of his death.

Mr. SCHLESINGER: I think perhaps that was the fact, but we will admit that at the time he boarded the mail car at Oakland, California, bound for Ogden, that he had this commission upon his person. Now that is the fact and I want to save this question of exhibition to the conductor, in case you raise that point.

Mr. BAGLEY: No, the admission as I stated it was to be, that he used that commission as an evidence of his right to ride at that time going to San Francisco on this trip and returning to the point named.

Mr. WILLIS: As evidence of his right of transportation.

Mr. BAGLEY: Now unless that comes in that way, of course we will not make the admission on our part.

Mr. SCHLESINGER: I don't see where there is any difference in the one offered by us. Do you mean that he exhibited the commission?

Mr. BAGLEY: No, that he used that as an evidence of his right to ride, make it read that way.

Mr. SCHLESINGER: Yes, I don't care anything about that. Now, by stipulation of counsel, we will now read, by consent of counsel, pursuant to the stipulation which is on file, we will now read the deposition, or rather the transcript of the testimony given by Jacob A. Floren in the case recently tried here, a witness called by the plaintiffs in that case, and we read this in support of the plaintiffs here.

77 Counsel then read as follows from the transcript of the testimony in the case of Mary E. Neesley et al. v. Southern Pacific Company:

JACOB ALFRED FLOREN, a witness called by the plaintiffs, being first duly sworn, testified as follows:

Direct-examination.

By Mr. AGEE:

Q. What is your name?
A. Jacob Alfred Floren.
Q. Where do you reside?
A. Ogden.
Q. Does your family reside here?
A. No.
Q. Where is your permanent residence?
A. Hinsdale, Montana.
Q. Have you ever been in the employ of the Southern Pacific Co.
A. Yes sir.
Q. In what capacity?
A. As an engineer.
Q. Were you employed during the month of January, 1907?
A. Yes.
Q. As an engineer on that road?
A. Yes.
Q. How long had you been employed as an engineer at that time?
A. By the Southern Pacific Company?
Q. Yes?
A. Seven years and two months, with the exception of six months.
Q. Had you been employed as an engineer on other roads?
A. Yes sir.
Q. What roads?

A. Great Northern, Oregon Short Line and Rio Grande Western.

78 Q. At that time what had been your entire experience as a railroad engineer, what length of time had you been railroad engineer altogether, that is approximately, I don't expect you to give it exactly?

A. Over ten years, eleven years.

Q. Have you been employed by the Southern Pacific Company continuously for the last six or seven years?

A. Yes; well, no, last five years.

Q. Continuously during five years?

A. Yes.

Q. Been running all the time?

A. Yes.

Q. Have you been running continuously over the road here for the last year or two?

A. Not last summer.

Q. Have you been off for awhile?

A. Yes.

Q. How long?

A. About four months and a half.

Q. What time did you leave?

A. August.

Q. August of last year?

A. Yes.

Q. And when did you go to work then?

A. The 18th of December.

Q. Where were you during the time you were off?

A. On my ranch.

Q. On your ranch in Montana?

A. Yes.

Q. Now you say you were in the employ of the Southern Pacific Company in January, 1907. Were you on duty and in charge of an engine on the 13th of that month?

A. On what day?

79 Q. On the 13th of January, 1907?

A. Yes sir.

Q. And where?

A. Between Montello and Ogden.

Q. And what kind of a train?

A. Freight train.

Q. Who was your conductor?

A. Johnson.

Q. A. J. Johnson?

A. I don't know his initials.

Q. Do you know who your fireman was?

A. Yes, his name was McDonald.

Q. Do you know his first name?

A. No, I don't remember.

Q. Do you know where he is now?

A. No sir.

Q. Have you made inquiry about him?
A. No.
Q. Do you know who the head brakeman was?
A. Know him by sight.
Q. Was it the gentleman who has just left the witness stand, Mr. Richmond?
A. Yes sir.
Q. Which way was your train running in the afternoon of the 13th of January of last year?
A. From Montello to Ogden.
Q. That would be east?
A. Yes.
Q. On that trip and when you reached a point between Gartney and Umbria Junction, did anything unusual occur to your engine?
A. Yes sir.
Q. What was it, Mr. Floren, just describe to the jury?
80 A. The engine dropped down and gave a lunge, struck a few times and straightened up.
Q. Now you say the engine dropped down?
A. Yes.
Q. On which side, or was it the whole engine?
A. I think it was on the north side, or the left side of the engine.
Q. That would be the fireman's side?
A. Yes.
Q. Now, describe particularly just what the movement of the engine was and the sensation that it created?
A. Well, it gave a sudden movement, a sudden drop and then raised again and makes a kind of another drop on the other side and that is the way they go until finally it gets still and gets into its motion again.
Q. What do you say as to the extent of the drop?
A. I couldn't say.
Q. Well, was it such as to—you were an experienced railroad man at that time—was it such as to cause you to be alarmed for the safety of the engine?
A. Yes sir.
Q. What impression did it make upon you as to what would probably result at the time you first felt the drop?
A. The impression made upon me was that it was a bad place in the track.
Q. Did you or did you not feel alarmed as to whether your train would be derailed?
A. Some, yes.
Q. What did you say that you expected from the lunging of the engine?
A. I didn't expect the train would pass over it.
Q. I mean at the time it first dropped?
81 A. Well, that comes on so sudden, the same as if a chair would drop from under you now, I didn't expect it.
Q. Do you mean by that the drop was a sudden drop?
A. Yes sir.

Q. And a lurch to the left hand side?
A. As near as I can remember.
Q. What do you say as to the impression made upon you as to the cause of that?

Mr. SCHLESINGER: That I think was stricken out.
Mr. WILLIS: I think so; the Court seems to have sustained it.

Q. What did you do immediately after this drop that you felt in your engine?
A. Applied the air.
Q. And then what after that, what attention did you pay to the engine or train after that?
A. Why, I slowed the train down and saw that it came over safely.
Q. You say you applied the air?
A. Yes sir.
Q. To what extent did you make an application of the air?
A. Made a service application.
Q. That is by applying the air, what do you mean by that?
A. Well, that is meant to steady a train.
Q. Do you mean that you applied the brakes?
A. Yes sir.
Q. You railroad men speak of applying the air, you mean apply the brakes by the use of the air?
A. Yes sir.
Q. And slowed your train down?
A. Yes.
Q. Did you look back over the train?
A. Yes.
Q. And what occasioned you to look back over the train?
82 A. Well, that is part of our business to look at the train and see that it is in shape.
Q. Why did you look back over this train?
A. I looked back; I couldn't say what made me look back.
Q. Ordinarily as an engineer which direction are you looking when running?
A. Ahead.
Q. And now you say at this time you looked back and what caused you to look back?
A. Being alarmed to think that it might be a possibility of us leaving the track.
Q. Now after passing over this place, did any conversation occur between you and your fireman and the head brakeman Richmond in reference to the matter, on the way from there into Lucin the next telegraph station?
A. Not as far as I remember.
Q. Do you remember any statement being made by you or by any of the persons on the engine in reference to the matter?
A. I don't speak very much on the engine unless I have got to.
Q. Do you remember whether you did at that time make any statement about whether you intended to report or not to report the condition of the track?

A. I don't remember.
Q. You don't remember whether you did or not. On arriving at Lucin what did you do, if anything, with reference to it?
A. I went back to the station.
Q. For what purpose?
A. To tell the operator that it was a bad place in the track.
Q. Did you tell him?
A. Yes.
Q. And did you send any message or telegraphic report of it?
A. I told him to send a message.
83 Q. Did you yourself send any message?
A. I didn't write it out, no.
Q. What did the operator say, if anything, about it when you told him to send a message, reuested him to send a message, did he make any reply as to whether he would or would not?
A. No.
Q. Did you tell him so that he could hear and understand what you said?
A. Yes sir.
Q. Did you explain to him the reason or necessity for sending the message?
A. Yes sir.
Q. What did you say you told him?
A. I told him to report a bad place in the track about a mile, I mean a mile and a half or two miles this side of Gartney, describing it.
Q. East of Gartney?
A. Yes sir.
Q. Described to him the point?
A. Yes.
Q. Then what did you do?
A. I got my orders, telegraph orders.
Q. Then what did you do, go on east with your train?
A. Well, the conductor came in there and we talked the matter over. The conductor also came into the office at that time.
Q. And what did you say you did there?
A. Why, I talked with him a minute.
Q. Talked with him about this?
A. Yes.
Q. And did you tell the conductor about this bad place in the track?
A. Yes, I asked him if he felt the bad place.
84 Q. Did you tell him about what your experience was, how you felt it?
A. Yes.
Q. So you reported it to the telegraph operator or station agent and also to your conductor?
A. Yes sir.
Q. What time did you arrive at Ogden?
A. I don't remember the exact time.
Q. Well, I don't ask you for the exact time, but as near as you can remember?

A. Some little short time after midnight, I think.
Q. Your family was residing here at that time, were they?
A. Yes sir.
Q. Do you remember about what time you passed this place in the track that you have mentioned?
A. Must have been somewheres between five forty-five or six o'clock, I don't remember the exact time.
Q. That was in the afternoon of the 13th of January, 1907?
A. Yes sir.
Q. And you say you reached Ogden shortly after midnight?
A. Yes, sir, somewheres in that time.
Q. And when did you next go out?
A. I don't remember.
Q. Did you go out the next day?
A. No, I don't think so.
Q. You were not on duty then on the 14th?
A. No, I don't think so.
Q. That is after you arrived here shortly after midnight on the 13th?
A. Not as I remember.
Q. When did you next go out over the road, as near as you can remember?
85 A. I think on the evening of the 15th. Now I couldn't say, but I think it was the evening of the 15th.
Q. At any rate, you went west over the road a short time after you came in that time?
A. Yes sir.
Q. And in going west over the road, did you see where the accident to No. 10 had occurred?
A. Yes sir.
Q. And did you see the engine of No. 10 lying by the side of the track?
A. You mean No. 10 engine?
Q. Yes?
A. Yes sir.
Q. Where was it with reference—at what point on the road did you see it?
A. I don't exactly know the distance.
Q. Well, give it just as near as you can?
A. Well, between a mile and a half and two miles, somewheres in that neighborhood, maybe more or less, east of Gartney.
Q. Where was it with reference to the bad place in the track which you had noticed on the evening of the 13th, to the best of your recollection or judgment?
A. It was in that vicinity.
Q. Which side of the road was the engine on, No. 10's engine?
A. On the north side of the track.

Mr. AGEE: I think that is all, you may cross-examine.
The COURT: Do you desire to read the cross-examination?
Mr. BAGLEY: The cross-examination, if the Court will recall it, is

quite long and a great deal of it does not pertain to this
86 case and I would like to ask an adjournment at this time, in order that we may shorten it up.

The COURT: I thought it would be more intelligible if he read the cross-examination before you read the redirect.

Thereupon at five o'clock P. M., the Court having admonished the jury in the form of the statute, adjourned until Tuesday, August 18, 1908, at nine-thirty o'clock A. M.

TUESDAY, AUGUST 18, 1908—10:25 A. M.

Jury called. All present.

Mr. BAGLEY: At this time we will not read the cross-examination, but will reserve the right to read it later, if further testimony seems necessary.

Mr. SCHLESINGER: The only trouble is, I want to read that redirect examination attached to the transcript.

The COURT: Well, I think you may do that, if they don't desire to read their cross-examination.

Portion of Redirect Examination of Jacob A. Floren.

(Read by Mr. Schlesinger.)

By Mr. AGEE:

Q. Now you stated to Mr. Willis you didn't think you could be mistaken as to the cause of the settling of the engine, and you also stated that the engine, after going around a curve, would sway or roll somewhat?

A. Yes.

Q. Until it would right itself, after getting around the curve?

A. Yes sir.

Q. Do you know whether or not what occurred at the point which you reported to the telegraph operator, was that ordinary movement of the engine?

A. It was ordinary movement.

87 Q. I say at the point where you reported that dropping of your engine and you reported it as a bad track, was the movement of the engine at that point just the ordinary movement after going around a curve, or was it something unusual?

A. Ordinary movement.

Q. Ordinary movement at the place where it dropped, at the place where you say the low spot was?

A. I thought you said previous.

Q. Well, previous to the time that you reached this bad spot when you first went off the curve, do you have any recollection as to any particular movement of the engine?

A. No, I have not.

Q. Was there anything out of the ordinary?

A. No.

Q. Now then, when you got down to this point, are you able to

say whether that was the ordinary movement that an engine makes after it goes around a curve?

A. No.

Q. Do you mean that it was not an ordinary movement?

A. Not an ordinary.

Q. You are positive about that?

A. Yes sir.

Mr. SCHLESINGER: That is all.

88 Mrs. MARY R. SCHUYLER one of the plaintiffs in this action, being called as a witness in behalf of said plaintiffs and duly sworn, testified as follows.

Direct examination.

By Mr. SCHLESINGER:

Q. What is your full name, please?

A. Mary Rebecca Schuyler.

Q. Won't you kindly talk so that this last juror may be able to hear you?

A. I will.

Q. Where do you live?

A. 1024 Brook Street, Oakland.

Q. I don't hear a word you say.

A. 1024 Brook Street, Oakland, California.

Q. Did you know Charles Albert Schuyler in his lifetime?

A. I did.

Q. Was he related to you?

A. That of a husband.

Q. He was your husband?

A. Yes sir.

Q. Is he living or dead?

A. He is dead.

Q. When did you last see Mr. Schuyler alive, Mrs. Schuyler?

A. On the 12th day of January, 1907.

Q. Have you any children?

A. Four.

Q. And their names and ages, please?

A. Rhea aged twelve, Edward aged ten, Vera eight and Dorothy between five and six.

Q. Are they living with you?

A. Yes sir.

89 Q. At your home in Oakland, California?

A. Yes sir.

Q. Of course they are the children of your marriage?

A. Yes.

Q. You say you last saw Mr. Schuyler alive on what day?

A. On the 12th day of January, 1907.

Q. And where did you last see him?

A. At the Sixteenth Street depot, Oakland, when he boarded the train.

Q. Did you accompany him to the depot?
A. I did.
Q. Won't you tell the jury the facts and circumstances of his leaving Oakland, California, on that day, just in your own way?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial; from the breadth of the question it is almost impossible to anticipate.
Mr. SCHLESINGER: If you would rather have me lead the witness, I will do that; I thought perhaps you would prefer the other form.
Mr. BAGLEY: Yes.

Q. You accompanied him to the depot?
A. I did.
Q. Did you see him enter the car?
A. I did.
Q. What particular car did he enter?
A. He entered the mail car.
Q. Did you have any conversation with him at that time?
A. I did; that is, when he put his grips in the mail car, he came back and stood down on the ground in front of the mail car door while they loaded the paper mail in the door and he said he——
Mr. WILLIS: Just a moment now, I object to the conversation.
90 The COURT: He hasn't asked for any conversation so far.
Mr. WILLIS: No, but she attempted to detail the conversation.
Mr. SCHLESINGER: Perhaps, if your Honor please, a declaration of the decedent at this time might be not strictly admissible; we do contend, however, that under all of the cases that will be admissible testimony when they put in their case in defense, but I think the objection perhaps is good at this time.

Q. You say you saw him enter the mail car?
A. I did.
Q. Now who were present when he entered the mail car?
A. The transfer clerks, one of the mail clerks, one or two of the mail clerks were taking the mail in the door and the conductor of the train stood at the truck.
Q. How do you know the conductor was present?
A. Because he urged the men to hurry and gave the signal to the engineer to move ahead.
Q. Where was the conductor standing with reference to Mr. Schuyler when he entered the mail car?
A. He was standing with his hand on the mail——

Mr. WILLIS: If the Court will allow me an objection to the answer of the witness to the preceding question?
The COURT: Yes.
Mr. WILLIS: I object to it as incompetent, irrelevant and immaterial.
The COURT: That is to say, the position of the conductor?
Mr. WILLIS: The conductor or anything about the conductor, that is not the theory of plaintiff's case.

Mr. SCHLESINGER: The theory of plaintiff's case is quite plain, and it is probably as plain to counsel—will be made plain to counsel. Of course the agent on the car, the agent of the conductor of that
91 train and the train agent on the train is the agent of the conductor. We want to show the attitude of Mr. Schuyler at the time he entered the mail car, that he was seen to enter the car by the conductor and by the train agent. Those are relevant facts, as a part of the transaction. If your Honor desires any authorities, I have them here quite handily and I can show them to the Court, that we have a right to show by what method he entered the train. He did not conceal himself, he went there in the presence of the agents of the company, it was known to them that he was there and nothing concealed about his entering the car, and I call your Honor's attention to the case of Everett v. Oregon Railroad Co. in the 9th Utah, a case in your courts here, to the case of Baltimore R. R. Co. v. Maryland, 6 L. R. A. and to the Ketcham case, in the 33rd Northeastern.

In other words, their defense here, one of their defenses here is that this man was a trespasser, that he had no business on that train, that he was there unlawfully. Now we desire to show by this lady here that he entered that car openly and in the full presence of the agents on that train.

Mr. WILLIS: Now, if the Court please, that is just the objection—if that be true, it is a matter of rebuttal. Furthermore, the mere seeing on the part of the conductor or even of the railroad company is wholly immaterial.

Mr. SCHLESINGER: Doesn't your answer specifically say that he was there without the knowledge of this company?

Mr. WILLIS: Yes.

Mr. SCHLESINGER: Very well.

Mr. WILLIS: Now that is an affirmative defense and if this testimony is proper, it is proper in rebuttal.

Mr. SCHLESINGER: Well, you admit that it is proper, do you?

Mr. WILLIS: No sir, I do not.

Mr. SCHLESINGER: We submit that is proper testimony under any phase of the case to show that he was there in the usual and customary manner. Of course the burden is upon them to show that he was a trespasser.

92 Mr. BAGLEY: Is it your contention that the conductor himself conferred a right by acquiescence upon Mr. Schuyler to ride?

Mr. SCHLESINGER: I submit he was not compelled to go to Mr. Harriman to get permission to ride upon these cars. The act of the agent is binding upon the principal. It has been so held in a great many cases here in Utah.

Mr. BAGLEY: I am quite familiar with those cases, it is not necessary for you to comment upon our familiarity with them. We enter the further objection, if the Court please, that under the law as it now exists and particularly under the Hepburn Act, Mr. Schuyler had no right upon that train, it was unlawful for him to travel on it and that the conductor could not confer a right upon him to be there or to ride, for that matter the company could not.

The COURT: Objection overruled, I think.
Mr. WILLIS: An exception.

Q. Was he facing, or how was he standing with reference to Mr. Schuyler as he entered?

Mr. WILLIS: May I have the same objection?
Objection overruled. Exception by defendant.
Mr. SCHLESINGER: Let it be understood it goes to the same question.

A. The truck was in front of him and he was standing with his hand on the back part of the truck facing the engine when Mr. Schuyler passed in front of him into the mail car door.
Q. Mr. Schuyler passed in front of him to the mail car door?
A. Yes sir.
Q. Did you meet the conductor?
A. No, not the conductor, I met the train agent.
Q. How did you come to meet the train agent at that time?

Mr. WILLIS: Also the same objection to this line of testimony and I assume the ruling will be the same and an exception.
The COURT: It may be so understood.

93 A. My husband introduced me to him as a relative of one of the postoffice clerks, I believe, at Ogden.
Q. You were introduced to him by your husband?
A. Yes sir.
Q. And was that immediately before he entered the mail car?
A. Yes sir, as we passed.
Q. Was there any one in the mail car when your husband entered it?
A. Yes sir, the mail clerks.
Q. I don't want you to tell the conversation, but did you notice whether or not your husband and the mail clerks in charge conversed together?

Mr. WILLIS: That is objected to as incompetent, irrelevant and immaterial.
Objection overruled. Exception by defendant.

A. My husband, in passing his grips in to the door, one of the mail clerks was standing at the door when my husband put his grips in the door and he merely said: "Hello, Charlie, are you going down with us tonight?"

Mr. WILLIS: Now I object to the conversation and move to strike it out.
The COURT: Yes.

Q. I don't care for the conversation, simply the fact. Mrs. Schuyler, you have frequently traveled with your husband, have you not?
A. I have small trips.
Q. You have frequently traveled with your husband during the eight months preceding his death?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial and leading.

Mr. SCHLESINGER: This is merely preliminary, Mr. Willis.

Mr. WILLIS: Well I don't understand, Mr. Schlesinger, that this testimony is preliminary. If you will treat me with the courtesy of waiting until I have made my statement, I will appreci-
94 ate it very much. I don't understand because it is preliminary that makes it competent or not leading.

Mr. SCHLESINGER: I was about to state, to relieve counsel of the necessity of making a statement to the Court, that I will withhold this testimony for rebuttal.

Mr. WILLIS: My business is here to make such remarks as the Court permits.

Mr. SCHLESINGER: I apologize to you, sir. That is all. Take the witness.

Mr. BAGLEY: Do I understand that all of this testimony is withdrawn?

Mr. SCHLESINGER: I say, take the witness.

Q. What was your husband's age?

A. He was forty-four years of age on the 12th day of January, the day that he left home, 1907.

Q. What was his condition as to sobriety?

A. Extremely good, he never drank, never used any liquor.

Q. What were his contributions to the family for say eight or ten years preceding his death?

A. All the way from—averaged about a hundred dollars a month, in fact all his salary, except what he kept for his personal wants and necessities.

Q. And where had he lived for say ten months preceding his death?

A. He had lived, after he was appointed to Ogden, he had lived in Ogden.

Q. Then he frequently visited you, did he, coming to San Francisco?

A. He did once a month.

Q. And w-ere were you living and where was your home while he was attending to his official duties in Ogden?

A. We had just built a home in Oakland, and I had stayed there to see it completed.

95 Q. And you lived there with your children?

A. I lived there in Oakland, yes.

Q. And how often during those eight months did you see Mr. Schuyler?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial.

Mr. SCHLESINGER: Oh. I submit that is relevant testimony.

Objection overruled. Exception by defendant.

A. He had made it a point to come down about once a month, or once every six weeks, just as he could arrange to get away from the office.

Mr. WILLIS: Now I move to strike that out on the grounds already assigned and the further ground it is not responsive to the question.

The COURT: I am rather inclined to think it is not, it may go out upon that ground, "that he made it a point."

Mr. SCHLESINGER: The words "that he made it a point" may go out.

Q. I will ask you the final question? What was the condition of his health when he left you at the Sixteenth Street Oakland station?

A. It was excellent.

Mr. SCHLESINGER: That is all. Take the witness.

Cross-examination.

By Mr. BAGLEY:

Q. How old are you, Mrs. Schuyler?

Mr. SCHLESINGER: I don't see that is at all a relevant question, to inquire into a lady's age. The recovery in this case does not depend upon her earning capacity.

The COURT: No, but her age forms an important element.

A. I was thirty-three years of age last month, the 22nd day of last month.

Q. What age?

A. Thirty-three years of age.

96 Q. What salary did Mr. Schuyler receive?

A. Thirteen hundred a year.

Q. When did he get that salary?

A. When he was sent to Ogden, when he was given the office at Ogden.

Mr. SCHLESINGER: He is asking you when.

A. I couldn't tell the very day.

Q. Contemporaneously with his promotion to the position at Ogden?

A. Yes sir.

Q. What did he receive prior to that time, the year previous?

A. The year previous I think twelve hundred, part of the time in his life he received fourteen hundred.

Q. What did he receive the year prior to that, three years prior to his death?

A. I think twelve, I wouldn't be certain.

Q. For how long a time had he received twelve?

A. I couldn't tell you just how long.

Q. You didn't mean to tell Mr. Schlesinger that he received twelve hundred a year for the last nine or ten years?

A. He received more than twelve hundred dollars for the last nine or ten years, because part of the time of that nine or ten years he received fourteen hundred.

Q. For how long a time?

A. For some time, I couldn't state how long.

Q. Approximately how long?

A. Well I don't know really, because he took a reduction on account of——

Mr. SCHLESINGER: Will you kindly raise your voice and talk to the last gentleman in the box. Judge Agee can't hear you either.

Q. Now isn't a fact that in 1891 he received eight hundred dollars a year?

A. I hardly think so.

97 Q. When he was on the Butte run?

A. When my husband—Oh, 1891, that was before we were married. When my husband was first appointed to the mail service, he was appointed at a salary of eight hundred, I believe, in Butte, Montana, but that was before our marriage.

Mr. SCHLESINGER: I submit that a man's earnings when he was a boy would not be a good standard of calculation for the jury. That is going back a long distance, seventeen or eighteen years.

Mr. BAGLEY: I will bring it up to date.

Q. In 1892 he received one thousand for that year?

A. That was before we were married.

Q. In 1893 he received nine hundred dollars a year, didn't he?

A. Yes sir, on account of transferring, he received that in order to go to California.

Q. And from 1893 to 1897 he received nine hundred dollars a year, isn't that a fact?

A. I couldn't say I'm sure.

Q. And from 1897 to 1898, March 1898, he received a thousand dollars a year from March 10, 1898 to July 2, 1900, he received $1150.00 a year, didn't he?

A. I believe so.

Q. Then you are mistaken in saying to Mr. Schlesinger that during the last ten years he had contributed one hundred dollars a month to the support of his family, if he only earned $1150.00?

A. There might have been other ways of contributing.

Q. What other ways

A. I don't know, that don't mean to say that all our financial dependence came from his salary.

Q. What other ways did he have, from what other sources did he contribute?

A. Well, he made a few dollars in real estate, my husband made a few dollars in real estate, which raised his income some.

98 Q. You say that he received fourteen hundred dollars a year during part of this time?

Mr. SCHLESINGER: Thirteen hundred, Mr. Bagley.

A. Fourteen hundred.

Mr. BAGLEY: She said fourteen.

Q. Now isn't it a fact that he received that salary but a short time in 1901, just a few months, and that thereafter on September 26, 1901 he was reduced to twelve hundred?

A. I think he received it for fifteen months that I have absolute knowledge of, that I remember of.

Q. Not in 1901?

A. I don't know anything about 1901, I couldn't say positively about his salary, the salary changed a great deal, it was something that year——

Q. Isn't it a fact that from September 29, 1903, to October 20, 1905 he received but one thousand dollars a year, owing to the reduction of salary?

A. When was that?

Q. From September 29, 1903 to October 20, 1905?

A. That was after his injuries?

Q. Yes.

A. Yes sir, he took a reduction to go in the office to get off the road on account of injuries.

Q. Isn't it a fact that from October 20, 1905 to July 21, 1906, when he was detailed as assistant chief clerk at Ogden, up to that time, that he was receiving twelve hundred dollars a year?

A. I think so.

Q. And when he was promoted to assistant chief clerk at Ogden November 7, 1906 he received thirteen hundred dollars a year?

A. Yes sir.

Q. Are you sure that he contributed $100.00 a month?

A. I am.

Q. Positive about it?

99 A. Well, I know it took that to run the expenses of our house.

Q. Did he contribute to the support of any one else out of his salary

A. He contributed to the—he helped contribute to the support of his mother and aged father.

Q. And to his sister?

A. And his sister.

Q. What did he give his sister a month?

A. He gave her whatever he could spare.

Q. Didn't he give her $15.00 a month?

A. Yes, I think he did, sometimes more.

Q. She was taking music lessons, and so on?

A. No, not to take music lessons, to care for her invalid mother and contributed that for the support of the family; his mother was an invalid.

Q. Well then, out of his salary he couldn't have contributed $100.00 a month?

A. I think I didn't say out of his salary.

Q. Well, I am asking you out of his salary, whether he did contribute $100.00 a month during the last nine or ten years?

A. My husband as a man who was capable of making——

Q. I asked you whether out of his salary he contributed to you and the children $100.00 a month?

A. No, not out of his salary.

Q. Approximately what out of his salary did he contribute?

A. Well, I don't know exactly, I know he contributed at the rate of about $100.00 a month, sometimes more, sometimes less; if there

were doctor's bills to pay there had to be more come; if there was no sickness in the house it didn't take so much to run it.

Q. Can you give me any idea as to how much out of his salary, when salary day came around, how much of his salary he gave you?

100 A. Well, I presume it was according to the amount of what he was getting, he contributed all except what it took for his lunches and it cost him nothing for fares, just what it cost him to live here steady during the day.

Q. Yes, and while he was out here at Ogden, of course he had all his expenses to pay?

A. He had his expenses to pay of course.

Q. Board and room?

A. Yes sir.

Q. And his personal expenses and his clothing?

A. Yes sir.

Q. Can you approximate about how much out of his salary?

A. I should say he contributed to the support of the family about an average of $100.00 a month, I don't know whether he got it out of his salary or where he got it; he met his own personal wants out of the other income and gave me his salary.

Q. What other income was there?

A. Well, as I say, he always made a few dollars on the outside, turning real estate, or something of that sort; he was capable of doing it; we couldn't have lived unless he had.

Q. But you can't say how much of this salary that he was receiving, sometimes a thousand, sometimes twelve hundred a year, that he contributed to you?

A. I know he would come in on pay day, or when I wanted money, he would give me the necessary amount to run the house.

Q. Do you know how much he withheld for himself?

A. Well, according to where he lived. If he was in Ogden it cost him about thirty dollars a month, his expenses. He was very economical while here.

Q. That is thirty dollars you mean for his living expenses while here?

A. Yes sir.

Mr. Bagley: I believe that is all.

101 Redirect examination.

By Mr. Schlesinger:

Q. In answer to a question put to you by counsel, you stated that he had free fare; what do you mean by free fare?

Mr. Bagley: I object to that, if the Court please, as incompetent, irrelevant and immaterial and not responsive to my question; it was a voluntary answer, there was no question of mine put to her that drew forth that information.

The Court: I think that is true, I think it was simply a voluntary answer.

Mr. SCHLESINGER: It was in response to a question as to how he disposed of his income and she said that he didn't have to of course pay his fare while traveling, in response to counsel's question.

Mr. BAGLEY: It was not in response to my question.

Mr. SCHLESINGER: I want to show that it was customary for Mr. Schuyler to travel upon his commission.

The COURT: Objection sustained.

Mr. BAGLEY: I move that the last remark of counsel be stricken from the record.

The COURT: That may go out.

Mr. SCHLESINGER: Oh yes.

Mr. BAGLEY: May I state to the Court our agreement about these depositions?

Mr. SCHLESINGER: Certainly.

Mr. BAGLEY: The record will show that counsel for the plaintiffs have agreed that the depositions heretofore taken of Mr. Stephens and Mr. Rhodes on behalf of the defendant may be read in evidence, notwithstanding their appearance here as witnesses.

Mr. SCHLESINGER: I will state now Mr. Stephens may be called in rebuttal by counsel for the plaintiffs. I will call him on one branch of the case.

Mr. AGEE: These depositions of course are subject to legal objections.

102 A. H. STEPHENS a witness called by the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. SCHLESINGER:

Q. Where do you reside?
A. San Francisco, or Oakland rather.
Q. What official position do you occupy, if any?
A. I hold the position of superintendent of railway mail service.
Q. How long have you held that position?
A. December 1st, 1904.
Q. Did you know Charles Albert Schuyler in his lifetime?
A. Very well.
Q. Did you know him in his lifetime?
A. Very well indeed.
Q. How long had you known him?
A. Since about February, 1893.
Q. Do you know what position he held in the government service at the time of his death?
A. He was detailed as assistant chief clerk of the service at Ogden, Utah.
Q. What territory did that position embrace?
A. That took in a portion of Montana, portion of Idaho, a small portion of Colorado, all of Utah and I believe a small portion of Nevada. I am a little mixed up on the map, I think this little local line runs out in Nevada, the old line of the Southern Pacific, and that was their territory.

Q. And our glorious state of California, did it take in that?
A. No sir; we hold that for ourselves, Mr. Schlesinger.
Q. Under whose general supervision was Mr. Schuyler?
103 A. He was under the general supervision of the superintendent, of course, immediately under the chief clerk.
Q. That is yourself?
A. Yes sir.
Q. Do you know without referring to your records about what length of time Mr. Schuyler held the position of assistant chief clerk stationed at Ogden?
A. It is my recollection that Mr. Schuyler was detailed and sent to Ogden along about October, 1906; I believe his promotion to the thirteen hundred per annum, which of course was the official way of designating him assistant chief clerk, was dated Washington, November 7, 1906.
Q. What position did he hold, Mr. Stephens, say for the eight months preceding October, 1906?
A. He was assistant scheme clerk in my office at San Francisco.
Q. Do you know about when it was that he assumed his position at Ogden?
A. I couldn't tell you without referring to my records; to my best recollection, it was some time during the month of October, 1906?
Q. Six or five?
A. It was 1906.
Q. That is about four months prior to his death?
A. Yes sir.
Q. Do you know how often you had seen him while he held his position in Ogden, how often he would report to you in your office at San Francisco

Mr. BAGLEY: I object to that as assuming that he did report.

Q. If he did report to you?
A. I have no recollection of his reporting to the office after he assumed his duties at Ogden, except immediately prior to his departure for Ogden on the trip that he was killed. He may have reported, but I don't remember it.
104 Q. Do you recollect upon what date it was that he reported to you in your office at San Francisco, about what date?
A. Why, I think it was on January——

Mr. BAGLEY: If the Court please, I object to that as incompetent, irrelevant and immaterial.
Mr. SCHLESINGER: He said he had once reported there.

Q. Can you recall the date of that report?

Mr. BAGLEY: May I have the privilege of asking the witness one question?
Mr. SCHLESINGER: Why, certainly.
Mr. BAGLEY: Do you mean by the use of the word "report" in your answer, was it your understanding of Mr. Schlesinger's question that he reported to the office at San Francisco to you on official business?

Mr. SCHLESINGER: Did I ask him anything about official business?

Mr. BAGLEY: I would like to get from this witness what he means by the word "report." I object to the question now, that it assumes that he reported.

Mr. SCHLESINGER: I will withdraw that question and ask you——

Q. Did he personally appear in your company office in the Federal Building in San Francisco a few days prior to his death?

A. He did.

Q. On what day was it?

A. I think it was on the 11th of January, the afternoon of the 11th, I believe.

Q. What were the duties of an assistant chief clerk of the post-office department at that time?

Mr. BAGLEY: Do you mean this particular chief clerk?

Q. Of any assistant chief clerk, belonging to this or any division within your supervision?

105 Mr. BAGLEY: I object to that as incompetent, irrelevant and immaterial.

The COURT: Objection sustained, I think.

Mr. SCHLESINGER: Well, your Honor, if I asked the witness the question, what were the duties of this assistant chief clerk, it would be certainly objectionable.

The COURT: Well, let us find out if it would be.

Q. What were the duties of this assistant chief clerk?

Mr. BAGLEY: I object to that as incompetent, irrelevant, and immaterial, calling for the legal conclusion and opinion of this witness.

The COURT: Calling for a legal conclusion, you say?

Mr. BAGLEY: Yes, as to what his duties were.

The COURT: Well, why?

Mr. BAGLEY: This witness may not state what the duties of the man were.

The COURT: Under his supervision?

Mr. BAGLEY: Yes.

The COURT: Objection overruled. Go ahead and answer.

Mr. BAGLEY: Note an exception.

A. The duties of the assistant chief clerk are well defined when the title is given; he is an assistant to the chief clerk.

Q. What duties does he ordinarily perform?

Mr. BAGLEY: May I have the same objection to that question?

The COURT: If you think it is subject to the same objection, you may have it.

Mr. WILLIS: It is not as to this particular decedent?

Mr. SCHLESINGER: We have no objection to counsel being allowed to stipulate now that all of their objections not enumerated may go with respect to the examination of this witness, so we can save time, Mr. Willis, then you can simply write out your objections and let them go into the record.

106 Mr. WILLIS: No, I prefer to make them at the time, lest they escape one's memory. Now the last question is objectionable on the same ground as the last one, it does not apply to this particular man.

Question read.

The COURT: That refers to this decedent.

Mr. WILLIS: Absolutely not.

Mr. SCHLESINGER: That is the very proposition I stated a few moments ago, this testimony should go to the duties of any assistant chief clerk.

The COURT: I don't think so. If it is competent at all, it would be competent as to this particular person. It may be that his duties are prescribed in a certain way, that would make his testimony inadmissible.

Mr. SCHLESINGER: If they are covered by written rules; if they are subject simply to oral rules, it is admissible as coming from the man under whose charge Mr. Schuyler was.

The COURT: I think so and I have so stated, if it applies to this particular one, but I don't see why we should go into the duties of all the chief clerks.

Q. What were the duties of the assistant chief clerk Mr. Schuyler at Ogden?

Mr. BAGLEY: The same objection and the same ruling?

The COURT: Yes, if it is subject to the same objection.

A. Mr. Schuyler was assistant to chief clerk Rhodes at Ogden and performed all of the duties assigned to him, office duties assigned to him by the chief clerk, in addition to that, took the place of the chief clerk in the chief clerk's absence and became the acting chief clerk, with all of the powers of chief clerk; performed all the duties of the chief clerk, had the general duties assigned him of overseeing of the service.

107 Q. Now won't you go more fully into what you mean by the phrase, "overseeing the service?"

A. Well, all officials of the service are——

Mr. BAGLEY: Just a moment, in order that the record may contain our objection and your Honor's ruling and an exception.

Mr. SCHLESINGER: That is understood to all of this kind of questions.

A. All officials of the service are expected and are instructed to pay particular attention to the service, whether or not it comes within his particular scope. We have general unwritten laws or regulations requiring every official of the service to be on watch regarding the service; that is what I mean by generally overseeing the service.

Q. You mean on watch at what place?

A. Every place.

Q. Now won't you be more specific and speak with reference to particular things.

A. I don't know how I can be.

Q. Well, with respect to the mail car, what if any duty would the assistant chief clerk have to perform there?

Mr. BAGLEY: The same objection.

Mr. SCHLESINGER: Yes, the same objection.

A. Whenever a chief clerk or an assistant chief clerk—and this applies to Mr. Schuyler, if you want him particularly—must pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mail is under his care and carries with it the responsibility to all officials of the service.

108 Q. Did he have any duty to perform with respect to the mail clerks in a postal car?

Mr. BAGLEY: Where?

Q. At any time?

A. Yes sir.

Q. What was that duty?

A. Well, the postal clerks work directly——

Mr. BAGLEY: Now, I want to make an objection, a further objection to that; it appears from Mr. Stephen's testimony that he had no jurisdiction of the mail clerks on the line with which we are now concerned, and I think this testimony is quite immaterial.

Mr. SCHLESINGER: The pleading admits that this accident occurred within the state of Utah.

Mr. BAGLEY: Yes, but Mr. Stephens has explicitly testified that his jurisdiction in the state of Utah on the Southern Pacific line is not on the line of this accident, and what his jurisdiction was over mail clerks on other lines is not material.

The COURT: I didn't so understand, if he did so.

Mr. BAGLEY: It is a fact that it does so appear.

Mr. SCHLESINGER: What appears?

The COURT: That his jurisdiction so far as the Southern Pacific was concerned, applied to the old main line of the Southern Pacific and not the new line.

Mr. SCHLESINGER: Not in Utah?

The COURT: I say I didn't so understand his testimony, that is what I have been trying to say.

WITNESS: Your understanding is correct, your Honor.

Mr. BAGLEY: May I ask one question?

The COURT: Yes.

Mr. BAGLEY: Did the assistant chief clerk at Ogden have any jurisdiction over the mail clerks running west to San Francisco?

109 A. The chief clerk at Ogden had jurisdiction only over the helpers on that line.

Mr. BAGLEY: That is over that line.

A. Yes sir.

Mr. BAGLEY: Now we submit the objection.

Mr. SCHLESINGER: I don't understand counsel's method; if he wants to cross-examine this witness along that line, he has a right to do so, but I am trying to establish from Mr. Stephens what the duty of Mr. Schuyler was as to entering a mail car within his territory and inspect the work of those clerks; that is all I care to elicit from this witness at this time.

Mr. BAGLEY: It is not pertinent to any issue in this case, if he didn't have that duty on this line and on this occasion.

Mr. SCHLESINGER: That is a matter for you to determine by cross-examination.

Objection overruled. Exception by defendant.

A. All postal clerks work directly under the chief clerk of the local district. The chief clerk is required to report, at the end of the probationary term of the clerk, as to his fitness and adaptability for permanent employment. On that report I base my recommendation to the department at Washington and the report of the chief clerk determines in a large measure whether or not a clerk shall be retained. I can't tell you off-hand, I can by reference to the records tell you what the report is.

Q. In other words, to enable an assistant chief clerk to ascertain the fitness of a postal clerk, he would have to enter the mail car and observe those postal clerks on duty?

A. Somebody must.

Q. Now, that duty of entering the mail car and observing the work of the postal clerks in charge came under the supervision of either the chief clerk in charge or the assistant clerk, isn't that true?

110 A. That is true, that applies to the helpers.

Q. I mean helpers of course. Now won't you tell these gentlemen here just what work the helpers in the mail car perform, just the system?

A. What we term helpers in the railway mail service are men who start out at the initial point on a run and assist in the distribution of the mail until it is completed, then they reurn without regard to the point at which the distribution may be completed, they return to the initial point preparatory to going out under a certain schedule, four day schedule it is here at Ogden. We had at that time forty-four helpers running out of Ogden and running in crews of eleven each, four cars; eleven men would take the fast mail train and go as far as might be necessary to complete the distribution and then immediately return to Ogden, preparatory to going out four days from that day.

Q. Now Mr. Stephens, if the assistant chief clerk or the chief clerk, as the case may be, has entered a postal car and there observed the work of the helpers and he had some complaint to find, how would he make that complaint?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial, furthermore it assumes an hypothesis that would be clearly

incompetent, irrelevant and immaterial and as far as we now are, does not appear in this case.

The COURT: Objection overruled.

Mr. WILLIS: Furthermore it relates to the duties, not of this decedent, or anything this decedent is shown to have performed or was performing at that time.

Mr. SCHLESINGER: Every man is presumed by the law to do his duty in the customary and ordinary manner.

Mr. WILLIS: Note an exception.

111 A. The duty of the assistant chief clerk, or any assistant chief clerk, if he comes in contact with the postal clerks, whether or not he finds an irregularity, is to make a report to his chief clerk immediately upon his return.

Q. And was there in existence upon the day of the death of Mr. Schuyler, a blank official report used then by the assistant chief clerk?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial.

Objection overruled. Exception by defendant.

Q. Was there such a blank in use?

A. There was a form 5054 upon which the chief clerk reported to the superintendent the qualifications, the work, the social habits and so forth of the postal clerk, the probationer.

Q. And did all the assistant chief clerks, including Mr. Schuyler, have that kind of a blank form of report?

A. They were furnished to all offices.

Q. I show you now a blank form of report No. 5054, the caption of it reading 5054 — Division, and ask you whether that was the form of report that was required to be filled up by the assistant chief clerks in the cases you have mentioned?

Mr. WILLIS: I object to that as incompetent, irrelevant and immaterial.

Objection overruled. Exception by defendant.

Mr. WILLIS: My objection was to the question. It has not been offered, I objected to the question as asked the witness.

Mr. SCHLESINGER: Now we offer this in evidence.

Mr. WILLIS: We object to it as incompetent, irrelevant and immaterial.

Objection overruled. Exception by defendant.

112 A. That report on the form 5054 must be filed with the department at Washington before a clerk can receive permanent appointment under the service.

Mr. WILLIS: I move to strike out the answer.

The COURT: It may go out. Mr. Witness, if you will wait until you are asked a question.

Thereupon said paper was marked by the stenographer as Plaintiff's Exhibit B and was received in evidence and was read into the record by Mr. Schlesinger as follows:

(5054.)

— Division.

Statement Concerning —— —— Railway Postal Clerk Between — and —, whose Probationary Appointment Expires — 190–.

1. What is his age?
2. Is his eye-sight good?
3. Has he a good memory?
4. Is he industrious, or indolent?
5. Does he show any aptitude for the service?
6. Does he take any interest in the service?
7. Is he ready and willing to obey instructions?
8. Is he careful or careless in doing his work?
9. Is he slow, or quick?
10. Has he a conciliatory disposition?
11. Does he learn his distribution slowly or readily?
12. What is his physical condition and fitness for this service?
13. Does he read the address on mail matter readily?
14. Is he noisy or talkative when on duty?
15. Is he addicted to the use of intoxicating liquors?
16. What are his social habits when off duty?
17. Is he apparently doing his utmost to succeed?
18. What is his general reputation and standing as a citizen?

113 19. Does he do his full share of the work?

20. Is he neat or slovenly in doing his work?
21. Does he keep his car clean and orderly?
22. Does he endeavor to comply with the regulations and orders?
23. Is it your opinion that he is a suitable person for the service, and one who could be promoted to more responsible grades?
24. Do you recommend his permanent appointment in the service?

Remarks: .....

.....

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——— ———,

Chief Clerk, at —.

Q. This blank I understood you to say was a blank furnished by the government to chief clerks and assistant chief clerks?

A. Furnished to chief clerks.

Q. Yes, and to be used by chief clerks and assistant chief clerks?

A. The report must be signed by the chief clerk, or the acting chief clerk.

Q. Filled up on information given by the assistant chief clerk?

Mr. WILLIS: I object to that and also the leading character of it.

Mr. SCHLESINGER: Well, I will withdraw that.

Q. Mr. Stephens, you have stated that you had known Mr. Schuyler a great many years?

A. Yes sir, I think about fourteen years before he was killed.

Q. Have you observed his habits with respect to sobriety and industry?

114 A. Yes sir.

Q. Were they good or otherwise?

A. They were good.

Q. Industrious, sober man, was he?

A. Yes sir.

Q. You further know, do you not, that he held a commission entitling him to free transportation over certain lines of the Southern Pacific Company?

Mr. BAGLEY: We object to that, if the Court please, as incompetent, irrevelant and immaterial and calling for the legal conclusion and opinion of this witness.

Mr. SCHLESINGER: Yes, it is. You may take the witness.

Mr. BAGLEY: If counsel and the Court will consent, we will defer our cross-examination, if we have any, until later.

Mr. SCHLESINGER: Now, I don't think that is an orderly way to try a law suit. He has given his direct testimony and I think he ought to be cross-examined now, unless counsel has some good reason to show why he should not be. This is the second time counsel has deferred his cross-examination. We would like to know what his cross-examination will be and would like to know it now. You wouldn't read the cross-examination of the witness Floren. Now you come here with——

Mr. BAGLEY: Pardon me, we have a stipulation we can read this at any time on our cause.

Mr. SCHLESINGER: That doesn't permit you to defer it, unless counsel consents to it. I don't know why you shouldn't cross-examine now. It rests in the discretion of the Court, of course.

Mr. BAGLEY: We have a deposition of this witness and we have a stipulation. It may be we will rely upon that, rather than upon the cross-examination.

Mr. SCHLESINGER: The witness wants to get back to California as quick as possible, he has official duties to perform there.

115 The COURT: Well, I can't myself see why you shouldn't cross-examine him at this time.

Mr. BAGLEY: For the reason, as I say, we have his deposition covering anybody all the points we will want to bring out and in that event we will not use him, but I only ask that it be deferred until we can look over the deposition.

Mr. SCHLESINGER: As it is counsel's deposition, counsel knows its contents and he knows now whether he should or should not cross-examine. I don't want to be discourteous, I like Mr. Bagley and would do anything on earth for him in reason, but I can't see any reason in this request.

Mr. BAGLEY: I submit to the discretion of the Court.

WITNESS: Your Honor, I would like to be released as quick as possible, strictly on account of official business; I would like to get out on the first train I can possibly get.

The COURT: When is that?

Mr. BAGLEY: Five-ten.

Mr. SCHLESINGER: Of course you can readily understand if the cross-examination is deferred, I might want to defer the redirect, and this will defer this case over to the next century.

The COURT: So far as I am concerned, I would be willing to go into recess now, providing you come back at one-thirty.

Mr. SCHLESINGER: That is agreeable to me.

Thereupon at 11:30 A. M., the Court having admonished the jury in the form of the statute, took a recess until 1:30 P. M. on this day.

116 TUESDAY, *August* 18, 1908—1:30 p. m.

Jury called. All present.

A. H. STEPHENS resumed the witness stand.

Mr. BAGLEY: If the Court please, our cross-examination of this witness will be very short, inasmuch as we have the consent to read his deposition and he wants to get away.

Cross-examination.

By Mr. BAGLEY:

Q. Mr. Stephens, what officer of the railway postoffice department had jurisdiction, authority and control, on and prior to January 14, 1907, over the mail clerks who ran east and west between Ogden and San Francisco?

A. Chief clerk at San Francisco.

Q. The chief clerk at Ogden and the assistant chief clerk at Ogden had no authority, jurisdiction or control over them?

A. No sir.

Q. You spoke this morning of their having authority on what you referred to as the old main line. You don't mean the railroad that leaves Ogden and runs out over the cut-off to San Francisco, including the point at which this accident occurred?

A. No.

Q. As I understand, by the main line you mean the old main line that is now a branch that runs out here to——

A. Umbria Junction.

Q. To Umbria Junction, where it joins the present main line?

A. Yes sir, the line running from Kelton out as far as Umbria Junction.

Q. Now the helpers on the east bound trains returning to Ogden, did they at that time perform any work on the mails?

Mr. SCHLESINGER: Now with reference to the time of this trip.

Mr. BAGLEY: Yes.

117 Q. Well, do you know whether they did?

A. They were not required to perform any distribution of mails east bound.

Q. They are not required to do any work east bound?

A. No sir.

Q. They merely dead-head back, without performing any work?
A. Yes sir.
Q. Had Mr. Schuyler, as assistant chief clerk at Ogden, at and prior to January 14, 1917, authority to, or was he expected to travel on trains on official business excepting when acting as chief clerk, or in the absence of the chief clerk, or under authority from the chief clerk, or yourself as district superintendent?
A. No sir.

Mr. BAGLEY: That is all.

Redirect examination.

By Mr. SCHLESINGER:

Q. Where was Mr. Schuyler stationed?
A. At Ogden.
Q. In what office at Ogden?
A. In the office of the chief clerk at Ogden.
Q. And who was the chief clerk?
A. Mr. H. G. Rhodes.
Q. And Mr. Rhodes and Mr. Schuyler were working together, were they not, in that office?
A. Yes sir.
Q. And Mr. Schuyler was the assistant chief clerk?
A. Yes sir.
Q. And Mr. Rhodes was the chief clerk?
A. Yes sir.
Q. And both stationed here?
A. Yes sir.
118 Q. Did the mail car going east from Oakland to Ogden carry any mail employés on this trip?
A. Any mail employés?
Q. Any mail clerks or mail employés?
A. Yes sir.
Q. How many were carried in that car?
A. I would have to refresh my recollection from the records.
Q. Well, just approximately?
A. Three through men, I believe, from Oakland Pier to Ogden and in addition to that the helpers that they picked up en route, whatever number that was, I can't tell without refreshing my memory.
Q. And there were mail clerks in that car?
A. Yes sir.
Q. I understand you to say this morning that it is the duty of the assistant mail clerk while traveling upon this commission to observe the duties, or rather to observe the work of the helpers in the car?
A. Yes sir, everybody in the car.
Q. And observing that work, his duty is to make mental note of it for the purpose of ultimately making a report?
A. Yes sir.

Mr. SCHLESINGER: That is all.

Recross examination.

By Mr. BAGLEY:

Q. Have you any personal knowledge how many mail clerks came in that car?

A. The only knowledge I have, Mr. Bagley, is from the records of the trip as submitted with the certificate of the clerk in charge.

Q. And do you know how many from that record?

A. From that record, yes sir. (Examining memorandum produced from pocket). There were five.

119 Mr. BAGLEY: That is all.

Mr. SCHLESINGER: That is all.

WITNESS: Your Honor, may I be excused now, with the consent of both attorneys?

The COURT: I am not sure about that; may Mr. Stephens be excused?

Mr. SCHLESINGER: I am willing, your Honor.

Mr. BAGLEY: We consent under our arrangement.

The COURT: All right.

H. G. RHODES, a witness called by the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. SCHLESINGER:

Q. Between November—we will say November 1st, 1906 and January 1st, 1907, what official position did you occupy?

A. Change the date to November 21st.

Q. That will do, yes.

A. I was detailed as chief clerk of the mail service here at Ogden.

Q. And you were up to January 20th of that year, were you?

A. Yes sir.

Q. And where were you stationed as such chief clerk?

A. At Ogden, Utah.

Q. Was there an assistant chief clerk at that time in your office?

A. There was.

Q. And what was his name?

A. Mr. Charles A. Shuyler.

Q. Charles Albert Schuyler. What were the duties of an assistant chief clerk, or what were his duties rather?

Mr. BAGLEY: I object, if the Court please, on the ground that it is calling for the legal conclusion of this witness as to what
120 the duties of assistant chief clerk were.

Objection overruled. Exception by defendant.

A. The duties of the assistant chief clerk in the office at that time were, as the title implies, an assistant to the chief clerk in the performance of the duties and attending to any matters that might be assigned to him by the chief clerk.

Q. What would be his duty with respect to observing the mail clerks in the mail car?

Mr. BAGLEY: The same objection, if your Honor please.
Mr. WILLIS: Note an exception.
The COURT: Yes. Of course, it should be what were his duties.

Q. What were his duties?
A. At any time he would be on the road, he would be expected to ride in the mail car and make note of anything that would be for the improvement or the betterment of the service, either in the plan of work pursued by the clerks or the distribution.
Q. Now, a final question. Do you recollect the occasion of Mr. Schuyler leaving upon his last trip, leaving Ogden for San Francisco, did you give him anything at that time, anything for use in the postal car, give him any article or articles?
A. Yes sir, I furnished him my bedding outfit.
Q. You mean a bedding outfit for a postal car?
A. Yes sir, to sleep in the postal car.

Mr. SCHLESINGER: That is all, take the witness.
Mr. BAGLEY: Under our arrangement that we will read the deposition, there will be no cross-examination.
Mr. SCHLESINGER: Yes; that is all, Mr. Rhodes.

121 GILBERT L. WARE, a witness called by the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. AGEE:

Q. What is your name?
A. Gilbert L. Ware.
Q. What is your business?
A. Fireman on the Southern Pacific.
Q. Where are you employed now?
A. Montello, Nevada.
Q. How long have you been in the service of the Southern Pacific Company?
A. Three years the first of next month.
Q. How were you employed in January, 1907?
A. I was employed in passenger work on Number 9 and 10.
Q. Were you thus employed on the 14th day of January, 1907?
A. Yes sir.
Q. Do you remember the occurrence of a wreck of passenger train Number 10 between Lucin and Gartney on the morning of the 14th of January, 1907?
A. Yes sir.
Q. How were you employed at that time?
A. As fireman.
Q. On that train?
A. Yes sir.
Q. Who was your engineer?
A. Frank Neesley.
Q. Now what time of day did the wreck occur?

A. Why, some time about five o'clock in the morning, about five-thirty as I understand.

Q. Now, I will ask you—will you just state to the jury what occurred just at and immediately prior to the derailment of the train?

122 A. Well, we just came down a long curve and on to the straight track and then as we were gliding along it seemed like it dropped right off the track, she dropped off is all I know about it.

Q. On which side of the track did your engine drop?

A. Left hand side.

Q. That would be the north side, if you were coming this way?

A. Yes sir.

Q. Now describe to the jury what the first thing that occurred out of the usual was, just as near as you can, just how it occurred and what effect it had?

A. It just seemed like there was a couple of Bump! Bump! and then just dropped into the ditch.

Q. The engine left the track?

A. Yes sir.

Q. Now what do you mean by there being a couple of Bump! Bump?

A. Just like it had dropped off, gone off of the rail, the rail went from under it, just dropped down.

Q. As though it was dropping down?

A. Yes sir.

Q. The engine dropping on the left side?

A. On the left side.

Q. And there were two or three of those bumps and then what occurred?

A. Went into the ditch.

Q. And after that time do you know anything about what occurred?

A. I don't know a thing.

Q. In other words, you were injured and were unconscious?

A. Yes sir.

Mr. AGEE: That is all, you may cross-examine.

Mr. BAGLEY: No cross-examination.

Mr. AGEE: It is admitted by the defendant that the expectancy of the deceased, Charles Albert Schuyler, was twenty-six years, as alleged in the complaint. The plaintiffs rest.

123 The COURT: Are you ready to proceed now, Mr. Willis?

Mr. WILLIS: Just a moment, if the Court please.

The COURT: Gentlemen, let us not spend any time so far as the second cause of action is concerned.

Mr. SCHLESINGER: We abandon that, if your Honor please.

Mr. AGEE: The second cause of action may be dismissed without prejudice.

The COURT: It may be so ordered.

Mr. BAGLEY: If the Court please, with the consent of counsel for

the plaintiffs, the defendant proposes to read the testimony of the engineer as given on the Neesley trial, a witness for the defendant.

Mr. AGEE: I think the record will show that the testimony was taken on the trial of the case of Neesley against the Southern Pacific.

Direct Examination of Nephi Gudmundson.

(Read by Mr. Willis.)

NEPHI GUDMUNDSON, a witness called by the defenadnt, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. What is your name?
A. Gudmundson.
Q. How do you spell it?
A. G-u-d-m-u-n-d-s-o-n.
Q. What is your first name?
A. Nephi.
Q. Where do you reside?
A. Ogden.
Q. How long have you lived here?
A. Well, I have been running out of here about twenty years.
124 Q. What is your business at this time?
A. Locomotive engineer.
Q. How long have you been locomotive engineer?
A. Well, I have been running engine about eleven or twelve years.
Q. And where have you run as an engineer?
A. I have run between Ogden and Carlin.
Q. Working for what company?
A. Southern Pacific Company.
Q. How long have you been employed as an engineer by the Southern Pacific Company?
A. Why, I have been—in fact it is the only company I ever did run an engine for all the time.
Q. Prior to engaging as locomotive engineer, what was your business?
A. I was fireman.
Q. And where?
A. On the Southern Pacific road.
Q. From Ogden west?
A. Between Ogden and Carlin.
Q. And for what period of time, about what period?
A. Well, I fired on the road from 1888 to 1892.
Q. And then from 1892 up to the present, what?

A. Well, I did what they call hostling, or engine dispatching and running switch engine between times.

Q. How long about?

A. Well, I don't remember just how long. I hostled and run switch engine between 1892 and 1897.

Q. And after 1897 as a locomotive engineer?

A. Yes sir.

Q. And what character of train, were you in freight or passenger service?

A. Mostly in freight service.

125 Q. How long in the passenger service?

A. I never was in passenger service regular.

Q. You have been as extra?

A. Yes sir.

Q. And when in the passenger service, where was your run?

A. I have run in passenger service between Ogden and Carlin.

Q. And was that generally the run in passenger service?

A. Yes sir.

Q. And in freight service, where was your run generally?

A. Well, up until right recently the run was between Ogden and Carlin.

Q. Were you in the service about the month of January, 1907?

A. Yes sir.

Q. Do you recall the fact of the derailment of No. 10 two miles or so east of Gartney?

A. Yes sir.

Q. Do you recall where you were on that day?

A. On the 14th?

Q. Yes.

A. Yes sir; I was at Montello.

Q. When had you gone to Montello?

A. Well, I arrived in Montello the morning of the 14th.

Q. About what hour?

A. At twelve-ten.

Q. Is that mid-day or mid-night?

A. That was midnight, twelve-ten A. M.

Q. And you went to Montello from where?

A. From Ogden.

Q. Do you recall about the time you left Ogden?

A. No, I can't say just when I left Ogden.

Q. Well, approximately?

126 A. I must have left Ogden some time in the forenoon, that is some time maybe between seven and eleven o'clock.

Q. Of what day?

A. Of the 13th.

Q. Do you recall passing over the track between Lucin and Gartney?

A. Yes sir.

Q. Do you remember passing over between Umbria Junction and Gartney?

A. Yes sir.

Q. About what time did you pass over that stretch of track?
A. Well, I passed there about eleven or eleven-five P. M.
Q. Of what night?
A. Night of the 13th.
Q. What was the distance between Umbria Junction and Gartney, that is about the distance?
A. Well, I don't know exactly, but I believe it to be a little over four miles between the Junction and Gartney.
Q. Now do you know about the place where No. 10 was derailed?
A. Yes sir.
Q. I will ask you first what was the character of train you had when you went west?
A. I have a freight train.
Q. About how many cars?
A. Thirty or thirty-two.
Q. Were they loaded or empty?
A. They were principally all loads, I know there was over twenty-seven loads in the train.
Q. Were they mixed, that is coal cars, flat cars and box cars, the same general class?
A. Not very much, they were most all manifest loads.
Q. By that you mean what?
A. Merchandise and such loads as that, not including coal.
127 Q. That would be in a closed car?
A. Yes sir.
Q. Do you remember what engine you had?
A. Yes sir.
Q. What was it?
A. It was 1783.
Q. Now again referring to this piece of track, do you recall about the time you passed over it. I think you fixed it somewhere about eleven P. M., am I correct?
A. Yes sir.
Q. In going west, which side of the track did you ride upon?
A. I rode on the north side going west.
Q. And with reference to the vertical direction from the rail, about where were you located, that is, whether it would be north of the rail, or south of the rail, or directly over the rail?
A. Well, it is nearly due over the rail.
Q. And were you on the ordinary engineer's side?
A. Yes sir.
Q. Now I will ask you if you discovered, about in the neighborhood of the place of derailment of No. 10, a piece of bad track?

Objected to as leading and modified.

Q. I will ask you whether or not, in passing over about and in the neighborhood of the place where No. 10 was derailed, say take two or three hundred yards the other side and two or three hundred yards each way, both east and west, whether you noticed anything the matter with the track?
A. No sir, I did not.

Objection by counsel as expressing an opinion and being leading.

Mr. SCHLESINGER: Yes.

Mr. WILLIS: The motion was made to strike out and by the Court denied.

Mr. SCHLESINGER: Just use your own discretion as to what you care to read.

128 *Cross-examination of Nephi Gudmundson.*

(Read by Mr. Agee.)

By Mr. AGEE:

Q. Do you have any more distinct recollection, Mr. Gudmundson, about your time that you ran between Gartney and Umbria Junction than any other point on the road?

A. Well, I know I passed over this portion of the road that night at that time.

Q. You have no more distinct recollection about that part of the road than any other?

A. Well, I couldn't say—yes, I do.

Q. You do have more distinct recollection about that particular part of the road at the time you went over it than any other?

A. Yes sir.

Q. And you had a fireman?

A. Yes sir.

Q. Who was your fireman?

A. I don't remember who was the fireman that night.

Q. Who were the members of your crew?

A. Well, I don't remember; I don't remember who the train crew was.

Q. Don't you remember even your conductor?

A. No sir.

Q. You had a conductor, didn't you?

A. Yes sir.

Q. And how many brakemen?

A. Two brakemen.

Q. Where did the brakemen ride?

A. One of the brakemen rode on the engine.

Q. You can't remember any one of them what their names were?

A. No, I can't remember the names of the train crew, I don't even remember the name of the fireman.

129 Q. How does it happen you can remember these other matters so much more distinctly than you can remember anything about your crew and can't even remember your conductor?

A. How is that?

Q. How does it happen you can remember those other matters about which you testified so much more distinctly than you can remember anything about your crew, you can't even remember the conductor who was in charge of the train?

A. Well, when we get to Lucin we are nearing the completion of

the trip and we pick up a helper at Lucin. We generally know the time that the helper comes there, how long we stay there and so on.

Q. That is what now enables you to fix more particularly this time over this particular part of the road?

A. Yes sir.

Q. Now how does that help you to fix it as to this particular trip?

A. Well, the records of the trip; of course we have records of the trip.

Q. Did you go west again in about a week, or within a week?

A. About that, yes sir.

Q. What time did you go over that piece, the next time you went over it?

A. Well, I went over there about the 17th or 18th.

Q. Of the month and I mean about what time of the day?

A. Went over there, passed there about noon time.

Q. How do you happen to remember that now?

A. Because we stopped there by the wreck; they were just clearing up the wreck then and the work train stood in the way.

Q. That was your first trip over?

A. Yes sir.

Q. What was your first trip prior to the trip on the night of the 13th, how long prior to the night of the 13th did you pass west over that track?

130 A. I couldn't say that.

Q. You don't know?

A. No.

Q. Within a week or ten days?

A. Yes sir, I would say within a week or ten days.

Q. What time did you go over that track on that trip?

A. Just prior to that you say?

Q. Yes, the first trip prior?

A. I don't know about that.

Q. And you don't know what time you passed along there any trip prior to the 13th—what time of day?

A. Well, I don't know that I do right now.

Mr. AGEE: Well, that is all.

Direct Examination of Thomas L. Dwyer.

(Read by Mr. Willis.)

THOMAS L. DWYER a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. What is your name?

A. Thomas L. Dwyer.

Q. Where do you reside?

A. I reside in Ogden.
Q. How long have you lived here?
A. I lived here about, made it my home about 17 or 18 years.
Q. What is your present business?
A. Locomotive engineer.
Q. How long have you been locomotive engineer?
A. I have been locomotive engineer for about eight years.
Q. Where have you operated locomotive?
A. On the Oregon Short Line and on the Southern Pacific.
131 Q. How long were you employed by the Short Line?
A. About two years as engineer.
Q. And how long for the Southern Pacific?
A. Five years and six months.
Q. And where for the Southern Pacific?
A. On the Salt Lake division, between Reno and Ogden.
Q. In the freight or passenger service?
A. Principally in freight service.
Q. To what extent in the passenger service?
A. Well, whenever I would happen to catch an extra trip.
Q. Do you know the scene of the accident to No. 10 about the 14th day of January, 1907?
A. Yes sir.
Q. How long if at all had you been acquainted with that piece of track before the accident happened?
A. Well, I had been acquainted with it ever since I have been running on the division.
Q. Do you remember whether or not you passed over that piece of track the night of the 13th of January, 1907?
A. Yes sir.
Q. Do you remember whether you passed over it more than once during that day?
A. Yes sir.
Q. How many times, about?
A. I passed over it six times.
Q. That was in east and west directions both?
A. Three times east and three times west.
Q. Do you know when you passed over it first?
A. Yes sir, within a few minutes I could tell.
Q. About when?
A. I passed over it about seven-five P. M.
Q. And after that about what time?
A. I passed over it about eight, between eight—about eight-ten or eight-fifteen.
132 Q. And next when?
A. About ten twenty-five or ten-thirty P. M.
Q. Of the 13th?
A. Of the 13th.
Q. Do you recall passing over it any other times than those you have just mentioned?
A. Well, I was eastbound looking out for myself, that is the rea-

son why I remember the time that I passed east, but going west I couldn't give just the exact time, because I was coupled in with a train.

Q. When you say you were looking out for yourself, were you running a light engine?

A. I was running a light engine and my own conductor.

Q. Your own conductor as well as engineer?

A. Yes sir.

Q. I gather from your remarks you were in the helper service?

A. Yes sir.

Q. From where to where?

A. I helped trains from Lucin to Tecoma.

Q. One way or both ways?

A. One way; the last help I made I stayed coupled in with the train to Montello.

Q. You don't remember the times you passed going west?

A. Well no, I couldn't give the time exactly going west.

Q. Did you have one engine on all of those trips?

A. Yes sir, the same engine.

Q. What was the engine?

A. 2698 consolidated.

Q. Do you know what its weight was?

A. It is 184,000 pounds on the drivers.

Q. 184,000; do you know what its dead weight was?

A. Well, the dead weight would be——

133 Q. That is approximately?

A. Something over 200,000 pounds, I don't know just exactly, around about 200,000 pounds.

Mr. WILLIS: Now, with the Court's permission, a leading question.

Q. Your weight on your drivers is indicated on your cab, painted on the cab?

A. Yes sir.

Q. But not the dead weight?

A. No sir.

Q. Now directing your attention to the scene of the accident, I will ask you whether you recognized and remembered where it was?

A. Yes sir.

Q. I will ask you in passing backward and forward both east and west that night, whether you noticed anything with reference to the track, ordinary, extraordinary, or in any wise?

A. I noticed—I didn't notice anything wrong with the track.

Q. Now, just one more question. Do you remember who the engineer was you helped as you went west on those three different occasions?

A. I remember one of them, I remember that I helped Mr. Gudmundson; that is the only one I remember.

Q. Is that the gentleman who has preceded you as a witness?

A. Yes sir.

Q. Do you remember the general character of train that you helped?
A. Freight train that I was coupled in with.

Cross-examination.

(Read by Mr. Agee.)

By Mr. AGEE:

Q. As I understand, you went east without any train and helped a train back each time?
A. Yes sir.
Q. Who was your fireman?
A. I believe my fireman's name was William Ziemer.

134 *Re-direct Examination.*

(Read by Mr. Willis.)

By Mr. WILLIS:

Q. In going west, would or wouldn't you ride on the right hand side of the engine?
A. Yes sir.
Q. Customary engineer's side?
A. Yes sir.
Q. And whereabouts would that put you with reference to the right hand rail, as you went west?
A. Well, it would put me on the north side of the track going west.
Q. Did you have a low or high wheeled engine?
A. The wheel is about 58 inches.
Q. And how many drivers on the side?
A. There are four drivers on each side.
Q. Have you a pony truck?
A. Yes, pony truck.
Q. Trailer or not?
A. No trailer.

Direct Examination of W. D. Murphy.

(Read by Mr. Willis.)

W. D. MURPHY a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. Where do you live?
A. Ogden.
Q. How long have you lived here?
A. Close on to forty years.
Q. What is your business?

A. Locomotive engineer.

135 Q. How long have you been an engineer?

A. About thirty-six years.

Q. Where?

A. Nine and a half years on the Union Pacific between Ogden and Green River and the remainder of the time on the Southern Pacific.

Q. Between what points on the Southern Pacific?

A. Between Ogden and Carlin.

Q. Do you remember the accident to No. 10 a short distance east of Gartney in January, 1907?

A. Yes sir.

Q. And at that time were you familiar with that piece of track?

A. Yes sir.

Q. About how long had you operated over it as an engineer?

A. I had been operating over it since '81.

Q. Passenger service or freight service?

A. Freight service for about five years and passenger service the rest of the time.

Q. Do you remember whether you passed over the scene of the accident on the 13th day of January in the afternoon?

A. I passed over it, but it was not in the afternoon, it was in the evening.

Q. About what hour in the evening?

A. Between eight forty-five and nine o'clock.

Q. What was the character of the train that you hauled?

A. It was a mail train, known as No. 9.

Q. Is that the opposite train to No. 10?

A. Yes sir.

Q. And what kind of an engine did you have?

A. I had the 2404, known as the Pacific type.

Q. Regular 2400 class?

A. Yes sir.

Q. And what was the character of train you had?

136 A. I had either four or five cars, I didn't make a note of that or keep a record of all of those runs, so I can't answer it perfectly. I don't know whether I had four or five, but one or the other.

Q. What kind of cars?

A. Mail cars, all.

Q. What is No. 9, eastbound or west?

A. West bound train.

Q. And at that time it was what?

A. It was Fast Mail at that time.

Q. Eastbound or westbound?

A. Westbound.

Q. Did it carry anything other than mail?

A. No sir.

Q. Going west you have reference to?

A. Yes sir.

Q. You didn't carry any passenger cars of any kind going west?

A. No sir.
Q. And the opposite train to No. 9, what did you carry going east?
A. It would carry mail and passengers.
Q. Now directing your attention to the place of the accident, you say you were familiar with it?
A. Yes sir.
Q. When you passed over it going west, I will ask you whether you noticed with reference to the track anything of an ordinary or extraordinary character, or any kind of character, at the place of the accident, or in the vicinity of the accident, say a few hundred yards either way?
A. No sir.
Q. Do you remember about what the speed of your train was as you went west that night?
A. I should say it was about 35 miles an hour.

137 Mr. AGEE: There is nothing in that cross-examination I care anything about.

Redirect Examination.

(Read by Mr. Willis.)

By Mr. WILLIS:

Q. What was the weight of the engine you had that night on the drivers?
A. It was 2400 class and they are 141,000 pounds on the drivers, marked on the cab.
Q. You are sure it was 141,000?
A. I think that is what it reads, 141,000 on the drivers.

Direct Examination of August A. Finck.

(Read by Mr. Willis.)

AUGUST A. FINCK a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. What is your first name?
A. August A.
Q. Where do you live?
A. Montello.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Seven years.
Q. What character of service have you been in?
A. Well, I was fireman before I was locomotive engineer.

Q. For how long?
A. About three years.
Q. Now where has your service as railroadman been?
A. On the Southern Pacific.
138 Q. Confined wholly to the Southern Pacific?
A. Yes sir.
Q. How many years all told?
A. About ten years.
Q. What part of the Southern Pacific system?
A. Well, Montello helper.
Q. And that operated between where?
A. Between Montello and Lucin and Montello and Valley Pass.
Q. That is both east and west of Montello?
A. Yes sir.
Q. Do you remember the circumstance of an accident to No. 10 a short distance east of Gartney on the morning of January 14, 1907?
A. Yes sir.
Q. Are you acquainted with the place where the accident happened?
A. Yes sir.
Q. Had you been acquainted with the place before the accident happened?
A. Yes sir.
Q. And for about how long before the accident happened did you know of the place?
A. How long before the accident?
Q. Yes, that is about how long?
A. All the time I was running over that part of the road, all the time helper from Lucin to Montello.
Q. About the time of the accident and just prior thereto, where were you engaged as locomotive engineer?
A. Montello helper.
Q. East or west of Montello?
A. Both ways.
Q. Do you remember where you were on the 13th day of January, 1907, that is the day before the accident?
A. Day before the accident?
139 Q. Yes.
A. The 13th?
Q. Yes.
A. I was ordered to Lucin to help trains.
Q. And when did you reach Lucin?
A. Well, I couldn't say just what time I reached Lucin.
Q. About what time?
A. Must have been about between one and two o'clock.
Q. In the night or day?
A. In the night A. M. or about one A. M. on the morning of the 14th.
Q. What direction did you go to Lucin from?

A. I come from Montello, east.
Q. What was the character of the engine operated?
A. One of the hogs, 2698, one of the big hogs.
Q. Do you know what its weight was on the driver?
A. Yes sir.
Q. What was it?
A. 184,000.
Q. Is that the same engine that Mr. Dwyer operated?
A. It must be the same one, I didn't notice. It is the same one I had, though.
Q. Do you remember passing over this point of the accident?
A. Yes sir.
Q. Were you light, or had you a conductor?
A. I was light this way and going the other way I had a train.
Q. Who was your conductor when you came this way?
A. I was my own conductor.
Q. When an engine runs light, the engineer is his own conductor?
A. Yes sir.
Q. And when did you go west from Lucin?
A. I left Lucin somewhere between three and four o'clock.
Q. Three and four o'clock?
140 A. Yes, somewhere between three and four o'clock.
Q. In the morning or the evening?
A. In the morning.
Q. Of what day?
A. Of the 14th.
Q. Now when you came east, what side of the engine did you ride on?
A. On the north side.
Q. No, when you came east from Montello to Lucin?
A. On the north side, I backed down.
Q. Oh, you backed down, did you?
A. Yes sir.
Q. And when you went west what side?
A. It would be on the same side.
Q. Did you have a fireman when you came east and west?
A. Yes sir.
Q. Same man?
A. Yes sir.
Q. Do you recall who it was?
A. No, I can't just remember who it was.
Q. Did you help a train going west?
A. Yes sir.
Q. What was the general character of that train?
A. It was a freight train.
Q. Do you remember the general character of the cars, whether flat or coal?
A. It was night, I couldn't say what kind of cars they were.
Q. Do you know the general size of the train?
A. I think somewhere along between 30 and 35 cars.
Q. Now I will ask you when you went over the point of the acci-

dent and for three, or four, or five hundred yards both east and west of the accident, that is when you went over it—did you go over it again that morning?

141 A. I went over it, I helped that train to Tecoma and then came back to Lucin.

Q. What time did you go back to Lucin?

A. Must have been somewhere between four and five o'clock.

Q. Did you go ahead of No. 10 that morning?

A. Yes sir.

Q. Now I will ask you when you came back were you light?

A. Yes sir.

Q. Were you backing?

A. Backing out.

Q. And riding on what side of the engine?

A. The same side I was before.

Q. Did you go west after that before the accident?

A. I came down and that was the last time until after they had the track fixed.

Q. I will ask you when you went over either of those three times, keeping in mind the place of the accident, and ask you if you noticed anything ordinary, or extraordinary, or otherwise, with reference to the track at the place of the accident, or for three, or four, or five hundred yards either side of the accident?

A. No sir.

Mr. AGEE: No cross-examination of that witness.

Direct Examination of David R. Johnson.

(Read by Mr. Willis.)

DAVID R. JOHNSON a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. What is your name?

A. David R. Johnson.

Q. Where do you live?

A. Ogden.

142 Q. How long have you lived in Ogden?

A. About five years.

Q. What is your present business?

A. Locomotive engineer.

Q. How long have you been locomotive engineer?

A. A year and six months.

Q. Were you an engineer prior to January, 1907?

A. Yes sir.

Q. And where was your run at that time?

A. Between Ogden and Carlin.

Q. What character of service?

A. Freight service.
Q. Was that the freight train service, or helper service?
A. Freight train service.
Q. Do you recall the circumstance of an accident to No. 10 in the vicinity of Gartney, a short distance east of Gartney on the morning of January 14, 1907?
A. Yes.
Q. Do you recall where you were about that time?
A. Yes sir.
Q. Where were you?
A. You say at the time the accident happened where I was?
A. I was at Montello at the time the accident happened.
Q. Had you gone over the point of the accident with your engine?
A. Yes sir.
Q. At what time about?
A. Some time between four and five o'clock in the morning.
Q. Of what day?
A. Of the 14th.
Q. That is the same day the accident happened?
A. Yes sir.
143 Q. Do you remember what was the character of the engine you had?
A. Yes sir, it was one of the Baldwin compounds.
Q. Do you remember its number?
A. 770.
Q. Was that a freight engine?
A. Yes sir.
Q. Do you remember what its weight was?
A. I am not sure, but I am under the impression it was 144,000 pounds on the drivers.
Q. What was the wheel construction, how many drivers did it have?
A. I think there was three on a side and a pony truck.
Q. Did you have a trailer or not?
A. No sir.
Q. Do you remember the general character of the train you had?
A. It was a freight train.
Q. Do you remember whether it was mixed in its character with respect to whether it was coal, flat, box cars, refrigerators, or what?
A. No sir, I can't remember.
Q. Do you remember about the number of cars in your train?
A. There was about thirty cars.
Q. Now I will ask you, Mr. Johnson, if you noticed anything ordinary, extraordinary or otherwise with reference to the track in the vicinity of the point of the accident and for several hundred yards either east or west of the accident?
A. No sir, I did not.
Q. You went west, I believe?
A. Yes sir, I went west.
Q. What side of the engine did you ride on going west?

A. On the right side, the north side of the cab.
Q. And that would be by the compass, assuming the track to run east and west, what?
144 A. It would be on the north side.
Q. Did you have a helper?
A. Yes sir.
Q. Do you remember who the engineer was?
A. No sir.
Q. Do you remember the engine?
A. No sir.
Q. You don't recall whether it was Mr. Fink who was the engineer of the helper?
A. I can't recall.
Q. Do you recall whether it was the ordinary helper out of Lucin or not?
A. That I couldn't say.
Q. Do you recall whether the engine was larger or smaller than the one you were operating?
A. No sir, I can't recall the helper engine.
Q. Do you recall whether the engine was pulling you, or was pushing at the rear of the train?
A. I don't recall.

Cross-Examination.

(Read by Mr. Agee.)

By Mr. AGEE:

Q. You had a fireman, I suppose?
A. Yes sir.
Q. Who was your fireman?
A. I don't remember his name.
Q. Who was your head brakeman?
A. I am not sure, but I think the head brakeman's name was Dickinson.
Q. He rode on the engine with you?
A. Yes sir.

145 THOMAS FITZGERALD, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS:

Q. Your name?
A. Thomas Fitzgerald.
Q. Your business?
A. Resident engineer Salt Lake division of the Southern Pacific.
Q. Your place of residence?
A. Ogden.
Q. How long have you borne that relation to the Southern Pacific Company?

A. About twenty-eight years.
Q. Are you acquainted with the location of the station of Gartney?

Mr. SCHLESINGER: Pardon me a moment, I didn't get the gentleman's name.
Mr. AGEE: Thomas Fitzgerald, resident engineer.
Mr. SCHLESINGER: Thank you.

Q. Are you acquainted with the location of the station of Gartney on the Southern Pacific, in the vicinity of the west boundary line of the state of Utah?
A. Yes sir.
Q. Where was that on and prior to the 14th day of January, 1907, in the state of Utah or in the state of Nevada?
A. State of Utah.
Q. And with reference to the eastern boundary line of the state of Nevada, where was it?
A. About two miles and a half.
Q. What direction?
A. East of the state line, Utah and Nevada.
146 Q. At that time were you acquainted with the station of Umbria Junction on the same line of railroad?
A. Yes sir.
Q. And where was its location at and prior to the 14th day of January, 1907?
A. Four miles east of Gartney.
Q. And within the boundaries of what state?
A. Utah.
Q. What was the distance of Gartney from Ogden at that time?
A. Gartney to Ogden?
Q. Yes.
A. Over the new line about 102 miles and over the old line 147 miles.
Q. When you say the new line, you have reference to the line across the Lake?
A. Yes sir.
Q. And the old line?
A. By way of Kelton and Terrace and Corinne north of the Lake.
Q. Do you remember the point of this accident?
A. Yes sir.
Q. Within what state?
A. In Utah.

Mr. WILLIS: I believe that is all.
Mr. SCHLESINGER: No questions, Mr. Fitzgerald.
Mr. WILLIS: On more question, Mr. Fitzgerald.

Q. Where then was the station of Montello?
A. Montello was about—it is about fifteen miles and a half west of Umbria Junction.
Q. And within what state?
A. Nevada.

Q. Was that true of its location and distance on the 14th day of January, 1907?

147 A. Yes sir.

Mr. WILLIS: That is all.

Mr. WILLIS: If the Court please, I offer the deposition of H. G. Rhodes, taken pursuant to notice of the 8th day of July, 1908, before Charles R. Holton, a notary public in and for the County of San Francisco, State of California, at his office in the city of San Francisco on the 25th day of July, 1908. Is there any objection?

Mr. SCHLESINGER: Well, I suppose it will be read in the usual way, question and answer, and if I see fit I will object as you go along.

Mr. WILLIS: I have reference to the deposition in its entirety, that is as to its notice and certificate.

Mr. SCHLESINGER: I don't object to it.

Mr. WILLIS: I likewise offer the deposition—this is the formal offer, for the purpose of affording opportunity of objection as to the manner of taking and the certificate—of A. H. Stephens, for the purpose of affording opportunity, if any to the manner of taking the deposition, the certificate and so forth.

Mr. SCHLESINGER: Why no, I haven't any as yet.

Mr. WILLIS: I ask that Mr. Bagley be sworn for a question or two.

E. M. BAGLEY, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. WILLIS

Q. Your name?

A. E. M. Bagley.

Q. Were you present at the taking of the depositions of Mr. Stephens and Mr. Rhodes before Charles R. Holton, a notary

148 public in and for the city and county of San Francisco, in the state of California, in the city of San Francisco, on or about the 25th day of July, 1908?

A. I was.

Q. I will ask you if you are acquainted with the two gentlemen whose names I have mentioned, to wit, Mr. Stephens and Mr. Rhodes, who were witnesses on the trial of this case this morning?

Mr. SCHLESINGER: I really can't see the purpose of it. Here is a deposition returned to this court, published by order of the court and bearing the certificate of the notary. What is the purport of it?

Mr. WILLIS: To show that the same persons whose depositions were taken were present here.

Mr. SCHLESINGER: Their names would appear upon the record here. We will admit that, we will admit that A. H. Stephens- —

Mr. WILLIS: All I desire is to show the identity.

Mr. SCHLESINGER: We admit that.

Mr. BAGLEY: And the deposition in any event is read under stipulation.

Mr. SCHLESINGER: Very true.

Deposition of H. G. Rhodes.

(Read by Mr. Bagley.)

H. G. RHODES, a witness called on behalf of the defendant in the above entitled action, being first duly sworn, testified as follows:

Mr. MOORE:

Q. Your name is H. G. Rhodes?

Mr. SCHLESINGER: Wouldn't it be the orderly way to read these depositions as they have been returned. The first deposition is that of Mr. Stephens. Of course that is a matter in the control of the Court.

Mr. WILLIS: Counsel for the defendant may offer to read either one and the return of the officer is made with reference to that, the same as he may call his witnesses.

Mr. SCHLESINGER: I think you are right about that.

149 (Mr. Bagley continued reading:)

Q. Your name is H. G. Rhodes?

A. That is my official name.

Q. Where do you reside?

A. I reside in Alameda, Alameda County, California, at the present time.

Q. What official station or position, if any, do you hold?

A. Chief Clerk of the Railway Mail Service, stationed at San Francisco.

Q. How long have you been a Chief Clerk of the Railway Mail Service?

A. Since November 21, 1906.

Q. Continuously since November 21, 1906?

A. Continuously.

Q. Whereabouts were you stationed in January, 1907?

A. At Ogden, Utah.

Q. As Chief Clerk?

A. As Chief Clerk.

Q. What assistance, if any, did you have in that position, at Ogden?

A. You refer to the personnel of the office?

Q. Yes.

A. Mr. Charles A. Schuyler was my assistant in the office at that time.

Q. When did you go to Ogden to assume that position?

A. I assumed that position on November 21, 1906.

Q. How long did you remain at that post?

A. I was transferred from Ogden to take charge in San Francisco, practically, on the 1st of October, 1907.

Q. When did Mr. Schuyler become your assistant there at Ogden, after you took charge?

A. Mr. Schuyler was already stationed at Ogden at the time I took charge.

150 Q. How long prior to the time you took charge had he been stationed there, if you know?

A. Let me see—the date I couldn't furnish.

Q. Do you recall Mr. Schuyler leaving Ogden some time in January, 1907, to come to Alameda, California?

A. I do.

Q. Do you recall his coming to you with any news or intelligence concerning his family, just prior to his departure?

A. He had received word of the death of his little boy.

Q. Where had his little boy died, according to your understanding?

A. In Oakland.

Q. Well, how did you know that he had received word of the death of his little boy out here?

A. I couldn't say now whether the word received by him was by letter or by telegram, but presumably by telegram.

Q. At all events, did he state to you that he had received word of the death of his little boy, and at that time did he have any paper, or letter, or telegram, in his hand?

A. Well, my recollection of the matter is that Mr. Schuyler received a telegram: that he had an unopened envelope containing a telegram, which he opened and read, and then he informed me of the death of the boy. My attention or my memory is more particular on the point that he called up, over the telephone, his sister-in-law, and informed her of the boy's death. My memory is clearer on that than it is on any other part of it.

Q. Do you recall his stating to you that he had received word of the death of his little boy—that he made that statement to you? I am not asking you for his words, but did you receive that news from him?

A. Yes, I received that news from him.

Q. And, without asking for his words, did he state to you that he would like to come out here to attend the funeral of his boy, and see his wife about the matter?

151 A. I wouldn't say that he stated that he had to come, but of course it would follow; I couldn't state now that he asked me, but I know the result of it was that he took the first train west that would get him to Oakland first. Of course he could not go without my permission.

Q. You sympathized with him in his bereavement, no doubt?

A. Naturally.

Q. There was no official business requiring him to make such a trip at that time, was there?

A. Nothing had been planned.

Q. There were no instructions given by you concerning the matter of what he should do?

A. No sir.

Q. In point of fact, he left just as soon as he could be conveniently transported,—taking the next fast train out?

A. He took the first train that would land him in Oakland first.

Q. What train was that?

A. That was the westbound fast mail, an exclusive fast mail train.

Q. Are you able to say when he arrived here—you say he took the first train out?

A. My recollection is that he arrived here on the afternoon of the day after he took his departure.

Q. So he notified you one afternoon, and the next morning he went out?

A. The next afternoon he went out, that is my recollection.

Q. What accommodations did he have for sleeping during the time he would be travelling across the country?

A. I furnished him with the outfit I had used on the road, consisting of a portable cot, blankets and bedding.

Q. As Chief Clerk, in supervising the business of your territory, did you from time to time go out on the road yourself on official business?

152 A. Yes sir.

Q. And upon such trips, were you allowed your expenses, consisting of your actual living expenses?

A. Yes sir.

Q. In point of fact, while you were Chief Clerk, who did the actual traveling for the Chief Clerk—Did you, as Chief Clerk, do it, or did you delegate it to your assistant?

A. I never have delegated it to my assistant.

Q. You attended to that in person?

A. Yes sir.

Q. So that in fact neither Schuyler nor any other assistant clerk, was ever delegated on one of those official trips by you, that arose from time to time, during the transaction of the business of the district, and which necessitated the presence of the Chief Clerk on the spot, or some personal representative of the Chief Clerk, with reference to some particular matter?

A. The only variation from attending to these matters personally myself was in the case of a wreck at Gartney, on January 14th. At that time I was obliged to detail an ordinary clerk at Ogden to proceed to the wreck and attend to the matters there in my stead.

Q. And that variation covers a period of how many years?

A. Since November 21, 1906, to the present time.

Q. And on all other occasions during that time, you have been on the spot in person, or travelled in person?

A. Yes sir, I attended to those matters in person.

Q. Do you know whether or not, on the day, or at the time at which Schuyler left Ogden, he had an outfit of his own, such as bedding and a cot? I am asking you of your own personal knowledge.

A. Schuyler had a bed in the office at Ogden, but I gave him my bed to use. He had a cot and bedding to use, as he slept in the office at that time. He didn't procure a room, and I hadn't located

at Ogden at that time myself—hadn't located as to a room.
153 So while Schuyler was gone I used his bed and he used mine.
Q. Was your bed more suitable for travelling?
A. Yes, his cot was a rigid cot, but mine could be knocked down.
Q. Yours had been bought with some idea of using it in travelling?
A. Yes sir, it was a travelling cot.

Cross-examination.

Mr. WRIGHT:

Q. You were the Chief Clerk at Ogden, Mr. Rhodes, at the time Mr. Schuyler left there on his way to Oakland to attend the funeral of his son?
A. Yes sir.
Q. Did you give him permission to leave?
A. Yes sir; he couldn't leave without my permission, unless he had taken it up with the Superintendent.
Q. As a matter of fact, you did give him consent—you permitted him to go?
A. Yes sir.
Q. I understood you to testify a minute ago that you became Chief Clerk at Ogden on November 21, 1906?
A. Yes sir.
Q. And you had been such from that time up to the time you were transferred here, is that correct?
A. Yes sir, I was Chief Clerk up to the first of October, 1907.
Q. And you were transferred, were you, to San Francisco, some time in October, 1907?
A. The first of October, 1907.
Q. Did you ever delegate Mr. Schuyler, during your incumbency as Chief Clerk, to go out on the road on official business?
A. No sir.
Q. Are you sure of that, Mr. Rhodes?
A. Yes, I am sure that I never delegated him at that time.
Q. Mr. Schuyler was there at Ogden prior to your taking the position of Chief Clerk?
154 A. Yes sir.
Q. Do you remember how long he was there?
A. No, I couldn't say as to that.
Q. What official position did he hold at the time you became Chief Clerk on November 21, 1906?
A. Assistant Chief Clerk.
Q. And he continued as such up to the time of his death?
A. Yes sir.

Mr. WRIGHT: That is all.
Mr. MOORE: That is all.

Deposition of A. H. Stephens.

(Read by Mr. Bagley.)

Mr. BAGLEY: Shall I read that stipulation?
Mr. SCHLESINGER: I don't care about that.

Mr. MOORE:

Q. What is your full name?
A. Alexander H. Stephens.
Q. What position, official or otherwise, do you at the present time occupy?
A. Superintendent of the Railway Mail Service of the Eighth Division.
Q. What district comprises the Eighth Division?
A. The States and Territories of Arizona, California, Nevada, Utah, Idaho, Oregon, Washington, Alaska, the Hawaiian Islands, a portion of Texas, New Mexico, Colorado and Montana.
Q. Mr. Stephens, state whether or not, included in the duties of that position, are the general supervision and charge of clerks and chief clerks stationed at various points in the different States and Territories that you have mentioned?
A. Yes sir.
Q. Who was the chief clerk or agent, if you recall, stationed at Ogden in January, 1907?
155 A. Mr. H. G. Rhodes.
Q. Do you recall who the assistant clerk was at that point at that time?
A. Mr. Charles A. Schuyler.
Q. This was within your jurisdiction or district?
A. Yes sir.
Q. Where do you reside?
A. In Oakland.
Q. Alameda County, State of California?
A. Yes sir.
Q. Do you recall, Mr. Stephens, seeing Mr. Schuyler some time in the month of January of that year here in San Francisco?
A. Yes sir.
Q. Where was it that you saw Mr. Schuyler on that occasion?
A. In my office in the Post Office Building, in San Francisco.
Q. Did you have any conversation with him at that time?
A. Yes sir.
Q. What if anything was said by him at or about the time you saw him during his call, in reference to any bereavement in his family?
A. He informed me of the death of his child by diphtheria, as I remember it, immediately after I entered the room; I think he was in my office, and I returned to it from some other point in the building.
Q. Prior to the visit or call, or whichever you choose to term it,

of him upon you upon that occasion, had you been expecting him for any reason?

A. No sir.

Q. Was there any matter of official business pending in your office concerning which you expected him to call to see you at that time, or upon that particular occasion?

A. No; but as to that, there is hardly ever any question that comes up in my office, Mr. Moore, upon which an Assistant Clerk,
156 or even a Chief Clerk, might not call, but we never do expect a Chief Clerk, or an Assistant, to come to the office until we get something from him. So I hardly know how to answer that question.

Q. Well, I was merely trying to get at the nature of this call or visit, to ascertain whether it was with reference to some piece of business that was to be transacted, or merely a call in the nature of official etiquette.

A. Very rarely does a Chief Clerk or an Assistant Clerk call upon me except when he has some business to transact. I didn't know that he was in the vicinity of my office until he called upon me that day or afternoon.

Q. Under what circumstances would you consider such a call a courtesy call, and by that I mean, if a Chief Clerk or an Assistant Chief Clerk, employed within your jurisdiction, should happen to call upon you while out here on a vacation, would you consider such a call in the nature of a courtesy call?

Mr. BAGLEY: That was objected to.

Mr. SCHLESINGER: I think the objection made by Mr. Wright in my opinion is a good one and I repeat it: I object to that question upon the ground that it is wholly immaterial and irrelevant, and not within the issues of this case, and as calling for a conclusion of the witness.

Mr. WILLIS: May I ask that the question be read?

Q. Under what circumstances would you consider such a call a courtesy call, and by that I mean, if a Chief Clerk or an Assistant Chief Clerk, employed within your jurisdiction, should happen to call upon you while out here on a vacation, would you consider such a call in the nature of a courtesy call?

Mr. BAGLEY: I think that is competent, if the Court please.

Mr. SCHLESINGER: His associate is not very enthusiastic over it.

Mr. WILLIS: I was waiting for you.

157 Mr. SCHLESINGER: I don't think that is relevant; you gentlemen don't think so, do you?

Mr. WILLIS: Yes.

The COURT: I can't see what difference it makes what he considered it.

Mr. WILLIS: Why it goes to this point, if the Court please, whether or not Mr. Schuyler was down there attending to business, as is the claim of the plaintiffs, or whether he was down there attending the funeral of his child and also tending to show whether

or not in all probability Mr. Schuyler was there in attendance upon the funeral.

Mr. SCHLESINGER: In view of the other questions and answers, I think we will withdraw it.

The COURT: Very well, go ahead.

Q. Let me ask you: What do you mean by "courtesy calls?"

A. When any official of the service is at the headquarters of the Superintendent in whose division the party is serving, it would be discourtesy on his part, if he did not make such a call.

Q. Coming back to this call which was made by Mr. Schuyler, was any business transacted between you upon that occasion?

A. As I have already explained, after Mr. Schuyler had informed me of the death of his child, and we had discussed the matter and its attendant circumstances, we discussed his departure for Ogden. I think I asked him when he expected to return home, and he told me that evening, or the following evening, if he could get away. We calculated when he would arrive in Ogden and I told him that was satisfactory. I think we also spoke about what train he would take. I asked him how things were getting along in Ogden, and he said "Very well, very nicely." That is about all that occurred.

Q. After he announced the death of his child, everything discussed or talked about by you was of a personal nature, about his misfortune in losing his child?

158 A. Everything talked about was his misfortune entirely, except as I have stated, as to how things were getting along in Ogden and about his departure.

Q. Did he state that he would like to get back to Ogden that night or the following night?

A. As I remember it, he said he could leave on Train # 10 that night, or the following night. I think it was the following night. I think he was in my office on the afternoon of the 11th and he said he could leave on the afternoon of the 12th, or the evening of the 12th, and he figured out that he would arrive in Ogden on the morning of the 14th.

Q. Pursuant to that statement of his as to his ability to leave at the time indicated, did you make any arrangement for passing him back to Ogden?

A. No arrangements were made by me at all.

Q. You don't know, of your own personal knowledge how it was that he got back there,—is that right?

A. Yes, I have no personal knowledge of how he got back——

Mr. BAGLEY: Now that next, I think we will object to the introduction of that.

Mr. SCHLESINGER: Do you object to the question and answer given by your own witness?

Mr. WILLIS: When it is not responsive to the question.

Mr. BAGLEY: It is a conclusion of the witness.

Mr. SCHLESINGER (Handing copy of deposition to the Court): He was asked about his knowledge and that certainly should remain in. The knowledge might be from general information, from

knowledge of the law, or from personal information. It is a strictly proper question and I submit we are entitled to it. Of course it is true, assuming, if your Honor please, without stating it, assuming it to be an adverse answer, they have no right to keep in as an answer that part which favors them and eliminate that which is against them. They must take the good with the bad. Now your
159 Honor knows what that answer is—I will not read the answer, but I will read the question: "You don't know, of your own personal knowledge, how it was that he got back there,—is that right? A. Yes, I have no personal knowledge of how he got back, except——" Now, what does that imply? That Mr. Stephens knew that he held a certain document, entitling him to return to Ogden, either in a passenger coach or in a mail car. Why did he know it? He knew it from having personally inspected the document by his having general supervision over the affairs of the office at Ogden as well as over Mr. Schuyler's conduct as an official and I submit it is responsive, brought out by them and they are bound by it.

Mr. BAGLEY: If the Court please——

The COURT: I don't care to hear from your side. I think that portion of the answer is not responsive and that you have a right to object to an answer which is not responsive.

Mr. SCHLESINGER: Then we make the further objection, if your Honor please, that no proper motion has been made to strike out here at all. This is testimony of a witness; this testimony is recorded in this court, it is testimony elicited——

The COURT: Now you may be right, so far as that is concerned. Just a moment, now. I am rather inclined to think you are right, but of course I think the Court has a right, inasmuch as this was taken as it was, that this answer should go into the record and then strike it out, but it should not be presented to the jury.

Mr. BAGLEY: May I read this (Reading paragraph preceding the first questions put to Mr. Stephens on direct examination): "I suppose, Mr. Wright, that you will stipulate that this deposition, as well as that of Mr. Rhodes, may be taken down in shorthand, and thereafter transcribed into typewriting or longhand, and, when completed, that the same may be read over by said witnesses, and by them corrected and signed; also, that all objections and exceptions to all questions and answers, and the right to make the same
160 upon the trial of this cause, may be reserved with the same force and effect as if they had been made at the taking of these depositions, except objections as to the form of the questions; also, the right to move to strike out any and all answers, or portions of answers." We now move to strike that out.

Mr. SCHLESINGER: My point was that you elicited the answer upon your own question.

Mr. BAGLEY: It is a conclusion of the witness, I move to strike it out.

Mr. WILLIS: The conclusion is not warranted by that document.

The COURT: That is one of the questions which I will have to decide.

Mr. SCHLESINGER: Of course if your Honor has any question about the correctness of that answer as being responsive, I would rather not have it.

The COURT: I think that portion of it is not responsive. Let the stenographer copy the answer in, so that the record may be clear as to what it is.

(Yes, I have no personal knowledge of how he got back, except that he had a commission that was good for transportation).

Mr. BAGLEY: As I understood, Mr. Schlesinger withdrew it.

Mr. SCHLESINGER: I don't care anything about the exception.

Mr. WILLIS: Then it may be stricken out of the record.

The COURT: It is out.

Q. The point I am trying to bring out is this: Did he, or did he not, take his departure for Ogden under any arrangements made by you, looking to the transaction by him of any business?

A. As far as I know, he did not.

Q. Speaking now about the positions of Chief Clerk and Assistant Chief Clerk back at Ogden, did either of these officials have any jurisdiction into or out of San Francisco at that time?

161 A. The Chief Clerk at Ogden has jurisdiction over the helpers who run out of Ogden westbound, and who live in Ogden. This supervision is one that is delegated, by the permission of my office, to the Chief Clerk at Ogden, who has charge of the entire line, the handling of the helpers, the arrangement of the runs, the reports upon their efficiency, which have to be made prior to their permanent employment in the service; and, as it can be better attended to——

(Mr. SCHLESINGER: I notice you sort of drop your voice occasionally. Won't you read a little bit louder, please.)

—by the Chief Clerk at Ogden, he has charge of the lines west of there just to that extent. He does not issue any orders regarding the exchanges of mails at the local offices on the line; in fact, he has nothing to do except the handling of the helpers that run out of there, and, on account of handling the helpers, he makes reports regarding those men, which, under ordinary circumstances, would be made by the Chief Clerk on the line.

Q. The clerks themselves, under whose jurisdiction are they?

A. The Chief Clerk at San Francisco.

Q. What is meant by a "helper?"

A. It is a man who gets on at a point to assist in the distribution of mails, and he returns to that point as soon as the distribution is completed. There are no regular points between which he travels.

Q. In reference to the handling of "helpers" that run out of Ogden, state whether or not, in point of fact, they get into San Francisco at all?

A. Very rarely would they get into San Francisco. I couldn't tell you offhand how often they get into San Francisco.

Q. That would be a matter that the Chief Clerk back there could tell?

A. I have records in my office showing how often they come in.

162 Q. Speaking generally, is it not a fact that they very rarely cross the California line?

A. Very rarely.

Q. It would be an exceptional circumstance for them, in the ordinary course of business, to do so?

A. Exceptional in the ordinary course of business. Ordinarily the distribution is completed upon arrival at Lovelocks, or Hazen, in Nevada. During the summertime, the helpers generally finish their work at some point east of Hazen; but during the winter, they will come as far west as Truckee, or some other California point.

Q. Where the Chief Clerk is stationed at Ogden, for the purpose of assisting in the transaction of his duties, would it sometimes occur that, upon official business, he would leave that point, and journey on the railroad to some other point?

A. The Chief Clerk, yes sir.

Q. During the time of such visits, as I have suggested, state whether or not he is entitled to expenses?

A. He is entitled to his actual necessary living expenses while on such trips.

Q. His actual necessary living expenses?

A. Yes sir.

Q. Take the case of an Assistant Chief Clerk, traveling out of Ogden to a point in California, on account of and by reason of the death of his son, state whether or not, on such a trip, such expenses would be allowed him?

Mr. SCHLESINGER: Now I object to that as incompetent, irrelevant and immaterial. There is no claim made here that Mr. Schuyler put in a charge for expenses, no claim and no proof, and it is totally irrelevant.

Mr. WILLIS: It is not for that purpose, if the Court please. The purpose is to show whether Mr. Schuyler received, or whether any account for the expenses of such a trip were presented, tend-

163 ing to show whether it was a business trip, or a personal trip to attend a funeral. When he went on business, he was paid; not having been paid in this particular instance supports our contention that he was on personal business in response to a telegram about the death of his son.

The COURT: I think, gentlemeen, I will overrule the objection.

Mr. SCHLESINGER: We take an exception, Your Honor.

Mr. BAGLEY continued reading.

Q. Take the case of an Assistant Chief Clerk, traveling out of Ogden to a point in California, on account of and by reason of the death of his son, state whether or not, on such a trip, such expenses would be allowed him?

A. I can't say whether they would be allowed or not; I know I haven't approved such expenses; they can't get past me.

164 Mr. SCHLESINGER: Now I move to strike out the latter part of the answer, "I know I haven't approved such ex-

penses; they can't get past me." The first part of the answer I submit should remain, "I can't say whether they would be allowed or not."

Mr. BAGLEY: I think the next question and answer will show.

Mr. SCHLESINGER: It is not responsive. The question was: "Take the case of an Assistant Chief Clerk, travelling out of Ogden to a point in California, on account of and by reason of the death of his son, state whether or not, on such a trip, such expenses would be allowed him?" and he says very properly, "I can't say whether they would be allowed or not." He does not allow the expenses, that goes on to Washington.

Mr. BAGLEY: He must approve them though.

Mr. SCHLESINGER: His answer—"I know I haven't approved such expenses, they can't get past me" is strictly irrelevant. I move that it be stricken out as not responsive.

The COURT: I think the motion may be denied; let the answer stand.

Mr. SCHLESINGER: Take an exception.

Q. Why not, Mr. Stephens?

Mr. SCHLESINGER: Now I object to that answer as being wholly irrelevant, immaterial and incompetent, and calling for the opinion of the witness.

The COURT: I will have to see that.

Mr. SCHLESINGER: It is the most outrageous expression of opinion I ever heard, absolutely so, you might as well ask a lawyer what is his opinion as to the law of a certain case and what he would do under a certain state of facts.

Mr. WILLIS: It comes very near being the question put by your friend and associate in the examination of this jury.

Mr. SCHLESINGER: We will take care of that when we come to it.

165 The COURT: It strikes me this comes within the ruling that I made upon the other question. Objection sustained, I think.

Mr. BAGLEY: We take an exception.

The COURT: That is to say now I am ruling the same as I did before, that that answer is not a proper answer. Of course just how it should go into the record——

Mr. BAGLEY: I will read it to the stenographer.

A. Well, I would consider it was not a trip in which he was transacting sufficient business for the Government. I do not think the Government would be justified in paying any expenses incidental to a personal trip.

Q. Suppose the man was on a vacation or pleasure trip, or a trip caused by the death of a relative?

Mr. SCHLESINGER: The same objection to that, your Honor, it is the same question practically.

The COURT: Objection sustained, I think.

Mr. WILLIS: An exception.

Answer read to the stenographer.

A. I would not allow expenses for such a trip.

Cross-examination.

(Read by Mr. Schlesinger.)

Mr. WRIGHT:

Q. As I understand, Mr. Stephens, it was in January, 1907, that Mr. Schuyler called to see you?

A. Yes sir.

Q. Do you recall the particular day in January, 1907, when he called?

A. It was either on January 11th or 12th.

Q. January 11th or 12th; and, at the time of his call, he stated to you that he had come west on account of the death of his son, did he?

A. Yes sir.

Q. Did he call to see you after that first call?

A. No sir, he was in my office only once.

166 Q. At your office once?

A. Yes sir.

Q. What conversation, if any, did you have with him at that time?

A. This was the entire conversation, Mr. Wright. Of course, I cannot give the exact words, but he inquired whether I had heard of his loss. I told him I had not. He told me all the circumstances of the death of his child through diphtheria; of some criticism that his family had been subjected to on account of their not notifying a doctor; the general talk that goes when a man suffers a loss of that kind, and another man tries to sympathize with him.

Q. Did you have any conversation at that time in reference to the duties of his office?

A. No sir, nothing about his office, except a mere inquiry that I made as to how things were getting along at Ogden, and he said "Very nicely."

Q. Did you give any instructions with reference to his returning to Ogden?

A. I asked him when he could return; and he said he could get away the next evening on "No. 10" and I told him that would be satisfactory.

Q. Did you order him to report to duty at that time?

A. No sir; in our conversation, I gave no direct order for him to report to duty; that goes with his position; he is to get back to duty as soon as possible.

Q. He stated that he was going to return to Ogden that evening or the following evening?

A. It was either that evening, or the following evening, that he could return to Ogden. I told him that would be satisfactory to me.

Q. You told him that would be satisfactory to you?

A. Yes sir.

Q. Have you jurisdiction over Chief Clerks and Assistant Chief Clerks?

167 A. Yes sir.

Q. Do you know whether Mr. Schuyler did return to Ogden that evening or the following evening?

A. Not of my own personal knowledge. The next I heard of him was when I got a telegram notice of a wreck.

Mr BAGLEY: Now I object to the next question, on the ground that it calls for the legal conclusion and opinion of the witness. That is the question you consented might go out.

Mr. SCHLESINGER: Yes, certainly.

The following question and answer were copied by the stenographer.

Q. Do you know whether or not Mr. Schuley had any commission entitling him to transportation over the lines of the Southern Pacific Company?

A. Yes sir, he did.

Q. Did you ever see that commission, Mr. Stephens?

Mr. BAGLEY: I object to that on the ground it is not cross-examination and not responsive to anything brought out on direct examination.

The COURT: I am rather inclined to think that would be so.

Mr. SCHLESINGER: Well perhaps, it is not material any way.

Q. Did you personally give this commission to Mr. Schuyler, Mr. Stephens?

A. No sir——

Mr. BAGLEY: I object on the ground it is not cross-examination; nothing in the direct examination about a commission.

Mr. SCHLESINGER: I submit that is perfectly proper. He was the chief there and had charge of these people. He was asked about transportation. I think that is a proper question.

The COURT: Well was he asked about transportation?

Mr. BAGLEY: No, your Honor.

Mr. SCHLESINGER: I think he was.

The COURT: There is nothing except that answer I struck out.

Mr. SCHLESINGER: I think your Honor is right about that.

168 Mr. AGEE: That question, I take it, was only for the purpose of laying the foundation for offering proof of the contents and as the contents are already in, I see no reason for it.

Mr. SCHLESINGER: Now, "Did you examine the contents of that commission?" Do you want that to go out?

Mr. BAGLEY: Yes.

Mr. SCHLESINGER: And "Are you familiar with its contents?" Do you want that to go out?

Mr. BAGLEY: Yes.

Mr. SCHLESINGER: Now this question is all right——

Q. Now, at the time Mr. Schuyler left Ogden, en route west to attend the burial of his son, do you know of your own knowledge whether or not he had obtained the consent of the Chief Clerk.

A. I do not.

Q. You said something on your direct-examination, Mr. Stephens,

in reference to the helpers. How far out do those helpers go from Ogden?

A. They run until the completion of the distribution on the train,—ordinarily, about Lovelocks, Nevada, and in exceptional cases to Oakland Pier.

Q. Who has jurisdiction of those particular helpers?

A. The Chief Clerk at Ogden, to the extent that I have mentioned. The Chief Clerk at Ogden handles those helpers, arranges their runs, and reports upon their efficiency, which forms the basis of my recommendation to the Department as to whether they shall be given permanent employment, or dropped from the rolls.

Q. State whether, of your own knowledge, Mr. Stephens, if an Assistant Chief Clerk should happen to be on a mail car, in which those helpers were, whether or not he had any authority over those helpers?

A. His office had almost complete control over the helpers at Ogden, yes sir.

Q. I understood you to say that you had seen this particular commission that had been issued to Mr. Schuyler?

169 Mr. BAGLEY: I object to that.

Mr. SCHLESINGER: Yes, that may go out.

Q. Can you state now, of your own knowledge——

Mr. BAGLEY: That is subject to the same objection.

Mr. SCHLESINGER: Yes, you are right about that, of course the names of the states appear in the commission.

The COURT: There is no redirect examination, I don't see any.

Mr. BAGLEY: No, there was no redirect.

Mr. SCHLESINGER: If your Honor please, we have concluded to shorten the case. We withdraw requestions for instructions numbers five and six.

The COURT: Just draw a line through them. Have you served copies of your requests upon the other side?

Mr. SCHLESINGER: I didn't know it was customary. I had to rely upon my friends here for that knowledge.

Mr. WILLIS: We have refrained from presenting requests, for we didn't know what to propose.

Mr. SCHLESINGER: Of course I have no objection, in fact I would be pleased to do it.

Mr. BAGLEY: Now, if the Court please, the defendant has not rested yet.

The COURT: The requests should be in at the time the plaintiff rests.

Mr. BAGLEY: The defendant now rests and we ask that the jury be excused, in order that we may present a motion to the Court at this time.

The COURT: I think the jury had better be excused until tomorrow morning at any rate.

Mr. WILLIS: I am of that opinion.

The COURT: I wonder if I hadn't better excuse them until about eleven o'clock. It will probably take the balance of the afternoon

for the argument. Then of course I may want some time
170 to consider the questions involved. I think perhaps we had better say eleven o'clock, and it is possible I may even want to notify the jury not to come at that time.

Thereupon at 3:30 P. M. the Court admonished the jury in the form of the statute and excused them until Wednesday, August 19, 1908, at eleven o'clock A. M. and the jury retired from the court room.

Mr. WILLIS: The matter presents itself to me, as to whether or not the plaintiffs have rested their cause in rebuttal?

Mr. SCHLESINGER: We have.

Mr. WILLIS: Now the defendant at this time, and after the parties, plaintiff and defendant, to this cause, have introduced all the testimony in chief and in rebuttal and have each rested their cause, moves the Court for an order directing the jury to return a verdict in this cause in favor of said defendant and against the plaintiffs and each thereof and that said Court is likewise moved to instruct said jury to return their verdict in favor of said defendant and against said plaintiffs and each thereof for the reasons and upon the grounds following:

1st. Because this action is predicated upon neglect.

2nd. Because the plaintiffs have failed to prove the material allegations of the first cause of action in their complaint necessary to a recovery in this case.

3rd. Because the plaintiffs have failed to prove any contract, or agreement, or authority existing between the government of the United States and the defendant, or between the decedent and the defendant or any one for and on his behalf and the defendant, permitting him to occupy a place in a car or cars of the defendant, at or at any time prior to and up to the time of the accident, or entitling said decedent to transportation in any wise or at all in any of the cars or trains of defendant.

171 4th. Because the commission so-called introduced in this case as a predicate of decedent's right of transportation at the time and place of the injury, was a mere request made by the government of the United States of and from the defendant, and of the compliance therewith or the granting of which there is no testimony of any kind or character.

5th. Because the entire testimony in this cause shows conclusively that the decedent, at the time of the accident complained of, was a trespasser upon defendant's train in question and was riding thereupon and had made a trip from Ogden to San Francisco and return to the point of the accident on personal business and for his own convenience and purposes only and in no wise connected with any official work or act he was required to or which he should have performed and in express violation of the statutes of the United States pertaining thereto.

Thereupon the Court heard in part the arguments of counsel for the respective parties upon said motion and at five o'clock P. M.

adjourned until Wednesday, August 19, 1908, at nine-thirty o'clock A. M.

WEDNESDAY, *August* 19, 1908—9:30 a. m.

The Court heard the further arguments of counsel for the respective parties upon said motion and it appearing to the Court that such arguments would consume the greater portion of the day, the jury were excused until Thursday, August 20, 1908, at nine-thirty o'clock A. M.

172 THURSDAY, *August* 20, 1908—9:30 a. m.

Jury called. All present.

The COURT: I think I will simply indulge in the practice of the Court and counsel withdrawing to the attorneys' room.

Mr. WILLIS: If the Court please, in view of that matter, I have a motion I desire to present to your Honor at this time.

Thereupon counsel for the defendant, without the presence of the jury, presented to the Court the following motion in writing.

(Title of Court and Cause.)

"The defendant moves the Court to direct the jury in this case to find a special verdict, in writing, upon the issues submitted said jury; and likewise moves the Court to submit to said jury the following questions, in writing, for their verdict and answer thereto, in writing:

1. Was the journey of the deceased, Charles Albert Schuyler, from which he was returning at the time of the accident, made by him to attend the funeral of his child?

2. Was the deceased, on said journey to and from San Francisco, engaged wholly in the performance of his official duties?"

The Court and counsel for the respective parties, having returned into the court room—

Mr. WILLIS: If the Court please, before the instructions begin, I desire to note an exception to your Honor's ruling, which has not been stated, except by your actions.

The COURT: I will state it in writing upon the request—do you mean as to the other? Of course that is determined by my writing also.

Mr. WILLIS: Yes, by your conduct in instructing the jury.

The COURT: Yes, and by my writing my special endorsement.

Mr. WILLIS: Also to the overruling of the motion.

The COURT: I understand that is controlled by the writing also.

173 Mr. WILLIS: It being in the form of a written motion.

The COURT: Yes, it may be understood that I have formally overruled it and you may have your exception.

Mr. WILLIS: Yes.

Thereupon the Court instructed the jury in writing.

Motion.

The defendant moves the court to direct the jury in this case to find a special verdict, in writing, upon the issues submitted to said jury; and likewise moves the court to submit to said jury the following questions, in writing, for their verdict and answer thereto, in writing.

1.

Was the journey of the deceased, Charles Albert Schuyler, from which he was returning at the time of the accident, made by him to attend the funeral of his child?

(Endorsed: Refused for the same reasons as defendant's request No. 3.)

2.

Was the deceased, on said journey to and from San Francisco, engaged wholly in the performance of his official duties?

(Endorsed: Refused for the same reason as the first part of defendant's request No. 4 is refused.
That also, there is no occasion in this case for submitting special interrogatories. J. A. Howell, Judge.)

174 *Portion of Argument of Mr. Agee, of Counsel for Plaintiffs.*

Mr. AGEE: Now, as to the question of damages—the Court has laid down the rule in regard to damages, that in arriving at the damages, so far as the contributions from his earnings are concerned, that it must be, not his total earnings, but his contributions to his family. The testimony of the plaintiff is undisputed that his contributions had been one hundred dollars a month, not simply from his earnings, but from his income, not from his earnings in the employ of this company, but his earnings from all sources which enabled him to contribute one hundred dollars a month, which is wholly undisputed. His expectancy was twenty-six years. It cannot be expected that he would follow this employment up to the very moment of his death, but say that twenty years of this he would be able to go on in his employment and there is some prospect of promotion for a man in the railway mail service as well as elsewhere. It shows that he had received a promotion only a few months before——

Mr. BAGLEY: We object to the remarks of counsel that the jury are to consider any evidence concerning the matter of promotion of this deceased, there is no evidence in the record to support it.

Mr. AGEE: The evidence shows that he had a short time before received a promotion and it is fair to presume that a man in the long service this man gave might receive other promotions and I say it is a legitimate and proper conclusion.

Mr. BAGLEY: We assign the remark of counsel as objectionable and misleading and ask the Court to instruct the jury that such is

not an element of damages—the jury may not consider a possible element of promotion.

The COURT: Objection overruled.

Mr. BAGLEY: To which we take an exception.

* * * * * * *

175 *Portion of Argument of Mr. Schlesinger, of Counsel for Plaintiffs.*

Mr. SCHLESINGER: Gentlemen of the jury, what have we to start with here? The government of the United States, as admitted by the answer of the railway company, pays this company annually large sums of money for the transportation of mails and large sums of money for the transportation of these postoffice employees, who either handle the mails or supervise the railway mail clerks, and, gentlemen, that contract carries with it a large and profitable compensation; the railroad company every day——

Mr. BAGLEY: I object to the remark of counsel that it carries with it a large and profitable compensation, for the reason there is no evidence in the record.

Mr. SCHLESINGER: It is legitimate argument and it is a notorious fact and I think I am entitled to make that to the jury.

The COURT: I think the answer admits that it receives compensation.

Mr. SCHLESINGER: The railroad company receives small compensation, adequate compensation for the carriage of mails and for the safe transportation of those connected with the mail service.

The COURT: I think as the statement is modified, it is not subject to the objection. I think the other objection is good.

Mr. BAGLEY: I withdraw the objection.

Mr. SCHLESINGER: It receives compensation; of course we all know by experience that railway companies don't do service for nothing. Gentlemen, this piece of paper in evidence here——

Mr. BAGLEY: If the Court please, I object to the use of that piece of paper, on the ground it is not admitted in evidence.

Mr. SCHLESINGER: I will read from what is admitted in evidence. There is admitted in evidence in this case, gentlemen of the jury—and counsel, following his usual right is constantly making objections, so my time may pass away quickly and I will per-

176 haps say nothing to you—there has been admitted in evidence in this case a copy of a ticket, not a copy of a pass, no free transportation, but a copy of a paid ticket, paid for by the government, for the free transportation of Charles Albert Schuyler over this line of railway, and how does that paid for ticket, paid for once by the government, how does that ticket read? and if I don't read that ticket correctly I give you permission now, in fact I invite you to correct me.

"POSTOFFICE DEPARTMENT, WASHINGTON, D. C.

To whom concerned:

The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk, railway mail service, with headquarters Og-

den, Utah and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given." That is, if another fare is charged, receipt should be given. "Valid only when issued through the office of second assistant postmaster general and countersigned by James E. White. G. B. Cortelyou." He was then postmaster general. Countersigned James E. White, general superintendent. The photograph of Charles Albert Schuyler attached to the ticket and this, gentlemen, good between all stations in Utah, Idaho, Nevada, California, Montana and Colorado. And this commission, good for the entire year, this commission, this paid for transportation, this piece of paper for which this railroad company received value, entitled Charles Albert Schuyler to travel anywhere between any stations, no matter how small or how large, within the six states named upon it.

Mr. BAGLEY: If the Court please, I object to the remark of counsel in stating that the commission entitled him to travel any place and anywhere, unless that statement is limited by the qualification that when he was on duty, unless he limits that.

177 Mr. SCHLESINGER: I do decline to limit anything, I am arguing this case legitimately, making proper inferences and reading from the paper itself and I do object to these constant interruptions, which are only made, in my judgment, to vex and annoy me and if the jury like it all right.

The COURT: Of course the Court has covered that by an instruction to the jury.

Mr. SCHLESINGER: I am commenting, if your Honor please, upon this piece of evidence and I repeat that under this commission——

Mr. BAGLEY: Now, I object——

Mr. SCHLESINGER: Am I not allowed to read what appears upon the piece of paper?

The COURT: Yes, but the Court has limited the effect of that paper by instructing the jury that he must be traveling——

Mr. SCHLESINGER: This commission?

Mr. BAGLEY: I ask the Court's ruling.

Mr. SCHLESINGER: Never in the course of twenty years' experience have I been so interrupted by counsel on the other side.

The COURT: Of course he has a right to interrupt counsel, if counsel is stating something which is not apparent in the evidence.

Mr. SCHLESINGER: I have'nt gone beyond this evidence yet, I said that he was allowed to travel between those stations at any time and within those states named upon this commission. Does your Honor claim that he is not?

The COURT: When in the performance of his duty.

Mr. SCHLESINGER: Undoubtedly, when in the performance of his duty.

The COURT: With that modification, it is all right.

* * * * * * *

Mr. SCHLESINGER: Now, there was a deposition taken in this case for the railroad company, of Mr. Stephens and Mr. Rhodes, taken

in San Francisco; but the plaintiff in this case brought
178 these men into the court room. You have heard their testimony and you men, as impartial and fair minded men, after having heard their testimony, were compelled to conclude that the plaintiff has absolutely established her case beyond any definite question. What does Mr. Stephens say in this testimony taken before you gentlemen, under the direction of his Honor, and this will control you in your verdict. I will read from page six. "Q. Now won't you go more fully into what you mean by the phrase "overseeing the service?" A. Well, all officials of the service are—— and then Mr. Bagley, with his ever-constant objecting, which of course he thought he had a legal right to make, "I object, your Honor," and objection overruled and Mr. Stephens finally permitted to answer. "A. All officials of the service are expected and are instructed to pay particular attention to the service, whether or not it comes within his particular scope. We have general unwritten laws or regulations requiring every official of the service to be on watch regarding the service; that is what I mean by generally overseeing the service. Q. You mean on watch at what place. A. Every place. Q. Well, with respect to the mail car, what if any duty would the assistant chief clerk *had* to perform there? A. Whenever a chief clerk or an assistant chief clerk—and this applies to Mr. Schuyler, if you want him particularly—must pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mail is under his care and carries with it the responsibility to all officials of the service."

Whenever he is upon a railway mail car. Why, gentlemen, in the name of all that is serious and all that is holy, was Mr. Schuyler upon a railway mail car when he left the 16th Street station at Oakland? Was there a postal railway mail car staring him in
179 the face when he went to the depot at 16th Street in Oakland? And if there was such a railway mail car staring him in the face, what in the name of common sense became the duty of Mr. Schuyler? Was it his duty to go into the smoking car? Was it his duty to go into the Pullman car? Or was it his duty, under the testimony of Mr. Stephens, to go into the railway postal car and remain there until that car had safely arrived at Ogden? Why, gentlemen, any other construction sought to be given to that kind of testimony is an insult to the intelligence of you intelligent men and no one knows it better than counsel upon the other side. I haven't patience—and yet you know I am not an impatient man—but I haven't patience with that kind of an argument. Now upon page six—in case you care to call for that testimony, page six of the testimony given right here in this court before your eyes and within your hearing, and not given off in San Francisco, where occasionally some queer things are done, in my state and my city——

Mr. BAGLEY: I object; I contend, if the Court please——

Mr. SCHLESINGER: I withdraw the remark.

Mr. BAGLEY: I assign the remark of counsel as error and ask the Court to instruct the jury at this time to disregard it.

The COURT: Of course they will disregard it and I will instruct them to disregard it, as it has been withdrawn.

Mr. SCHLESINGER: Now, proceeding, gentlemen—of course counsel seeks for a moment to interrupt, so proceed——

Mr. BAGLEY: If he didn't make such remarks, there wouldn't be so much interruption.

* * * * * * *

180 *Plaintiffs' Exceptions to Instructions.*

Come now the plaintiffs in the case on trial and in open court, in the presence of the Court and counsel for the defendant, and before the jury has returned a verdict in the case, and take and make the following exceptions to the charge of the Court and the refusal to charge as requested.

By Mr. AGEE:

The plaintiffs except to the giving of instruction No. 1, given by the Court on its own motion, and especially to the following portion, "and if performing the duties thereon," for the reason that it implies that even if the deceased was at his post of duty and under obligation at that particular time to perform duties in the postal car, but did not in fact perform such duties, the plaintiffs would not be entitled to recover.

Defendant's Exceptions to Instructions.

By Mr. WILLIS:

The defendant excepts to the refusal of the Court to give its offered instruction No. 1.

The defendant excepts to the refusal of the Court to give its offered instruction No. 2.

The defendant excepts to the refusal of the Court to give its offered instruction No. 3.

The defendant excepts to the refusal of the Court to give that part of its offered instruction No. 4 reading as follows:—"The Court instructs you that the commission issued by the government to said Charles Albert Schuyler, and upon which he was riding at the time of the accident complained of, was a request on the defendant company made by the government to transport said Schuyler only when he was engaged wholly in the performance of his official duties, and not otherwise."

181 The defendant excepts to the refusal of the Court to give its offered instruction No. 5.

The defendant excepts to the refusal of the Court to give its offered instruction No. 6.

The defendant excepts to the refusal of the Court to give its offered instruction No. 7.

The defendant excepts to the refusal of the Court to give its re-

quest as contained in the last paragraph of its offered instruction No. 12, reading as follows:—"I further instruct you that in considering the probable value of the life of Charles Albert Schuyler to these plaintiffs, you have no right to take into consideration any possible opportunity that he might have had of acquiring wealth or fortune in the future by change of circumstances in life."

The defendant likewise excepts to that part of instruction No. 1 given by the Court, reading as follows:—"The Court charges you that an assistant chief clerk in the railway postal service of the United States government, employed and engaged in the service of the government, if traveling on a railroad train in his position under contract between the government and the carrier for the carriage of mail, and if performing his duties thereon as such assistant chief clerk on said train, is a passenger for hire, to whom the carrier owes the same duty that he owes to passengers traveling in passenger cars, so far as its liability for personal injury arising from its negligence is concerned;"

The defendant excepts to that part of instruction No. 1 given by the Court, which reads as follows:—"but the Court charges you that an assistant chief clerk in the railway mail service, employed and engaged in the service of the government, if traveling on a railroad train, not in his position under contract between the government and the carrier for the carriage of mail and not performing any of his duties as such assistant chief clerk on said train, but traveling solely for his own purposes, unconnected with any
182 official duties, would not be a passenger for hire, but on the contrary a trespasser, to whom the carrier would not be liable for any such negligence as that with which the defendant herein is charged."

The defendant excepts to that part of instruction No. 2 given by the Court which reads as follows:—"I charge you that the presumption is that he was there lawfully and rightfully."

The defendant likewise excepts to that part of instruction No. 2 reading as follows:—"in the discharge of his official duties as such employé and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence."

The defendant excepts to that part of instruction No. 2 which reads as follows:—"but the Court charges you that such presumption would be overcome if by affirmative proof and by a preponderance of the evidence you are convinced that the said Charles Albert Schuyler, at the time of his injury and death on one of the railway mail cars of the defendant's line of road, was not there in the discharge of his official duties as an emlpoyé of the railway mail service, but while traveling on the defendant's railroad train at said time and place was traveling solely for his own purposes, unconnected with any official duty."

The defendant excepts to that part of instruction No. 3 which reads as follows:—"if you find from the testimony that the said Charles Albert Schuyler was a passenger within the meaning of the definition heretofore given you."

The defendant likewise excepts to that part of instruction No. 3 which reads as follows:—"If you find that the deceased, Charles Albert Schuyler, was at the time and place in question herein a passenger on defendant's line of railroad, within the purview of the instructions heretofore given."

183 The defendant likewise excepts to that part of instruction No. 3 which reads as follows:—"and that this admission raises the presumption of the negligence of the defendant and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from the improper construction of the track, failure to keep the track in proper repair, or negligence in operation."

The defendant also excepts to that part of instruction No. 3 which reads as follows:—"Whenever a train or car leaves the track, the presumption is, in an action brought by a passenger, that either the track or some portion thereof was not in a proper condition, or that the train was not skillfully or properly operated, or that the railroad company, whose duty it was to keep the track in proper condition and to operate its trains with prudence and care, has in some respect violated its duty and been guilty of negligence."

* * * * * * *

184 Subsequently the jury returned into court and rendered the following

Verdict.

(Title of Court and Cause.)

"We, the jury impaneled in the above entitled action, find the issue joined in the first cause of action in favor of the plaintiffs and against the defendant, Southern Pacific Company, and assess their damages in the sum of Nine Thousand ($9,0000.00) Dollars.

J. J. BRUMMITT, *Foreman.*"

185 STATE OF UTAH,
County of Weber, ss:

I, Eva C. Erb, official stenographer of the above entitled court, hereby certify that the foregoing 138 pages contain a full and correct transcript of all the testimony and other evidence adduced in said cause and all the objections and exceptions of counsel and rulings of the Court therein, except only the impaneling of the jury, which is not included herein.

Dated: October 5, 1908.

EVA C. ERB,
Court Stenographer.

186 Title of Court and Cause.

Notice of Intention to Move for New Trial.

To Agee & McCracken and Bert Schlesinger, Attorneys for Plaintiffs:

Please take notice that the defendant, the Southern Pacific Company, intends to move the court to vacate and set aside the verdict rendered and the judgment made and entered in said cause, and to grant a new trial thereof, for the reasons and upon the grounds, following:

1. Irregularity in the proceedings and by the adverse party; and abuse of discretion by the court, in each of which the defendant was prevented from having a fair trial.
2. Excessive damages appearing to have been given under the influence of passion or prejudice.
3. Insufficiency of evidence to justify the verdict, or to sustain the judgment.
4. That the said verdict and the said judgment are each against law.
5. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon the papers, pleadings, and files in said cause, upon the minutes of said court made and entered therein, and upon affidavits to be hereafter served and filed, and upon bill of exceptions to be hereafter prepared.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
E. M. BAGLEY,
Attorneys for Defendant.

Served and Filed Aug. 25th, 1908.

187 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER et al., Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

Order.

Upon motion of counsel for the defendant and good cause appearing therefor, it is ordered that said defendant be granted to and including Tuesday, September 8th, 1908, in which to serve and file affidavits upon motion for a new trial.

J. A. HOWELL, *Judge.*

Dated: August 27th, 1908.

188 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER et als., Plaintiffs,
v.
SOUTHERN PACIFIC COMPANY, Defendant.

Affidavit in Support of Motion for New Trial.

STATE OF UTAH,
County of Salt Lake, ss:

Jno. G. Willis, being first duly sworn on oath deposes and says: (1) That he is one of the attorneys for defendant in the above entitled cause, and as such had charge of, and conducted, the trial of this cause, and was present during all of the proceedings therein, other than when the jury retired in charge of an officer to deliberate and consider of their verdict. That the defendant, Southern Pacific Company, is a corporation, and that this affiant was one of the persons representing the defendant who was present during all of the times herein mentioned, and as such attorney and representative this affiant knows more about the facts herein set forth and alleged than the defendant or any other officer or representative thereof.

(2) That in the trial of this case the plaintiffs, by and through their attorneys, were guilty of misconduct and irregularity
189 which was calculated to, and did, prejudice the jury against the defendant, and thereby prevented it from having a fair and impartial trial; that said misconduct and irregularity consisted in this, to-wit:

First. That, in the opening argument to the jury, Mr. Agee, one of the plaintiffs' counsel, in discussing to the jury the rule as to the measure of damages in this case, made the following prejudicial remarks as taken down and transcribed by the official court stenographer: "Mr. Agee. Now, as to the question of damages—that court has laid down the rule in regard to damages, that in arriving at the damages, so far as the contributions from his earnings are concerned, that it must be, not his total earnings, but his contributions to his family. The testimony of the plaintiff is undisputed that his contributions had been one hundred dollars a month, not simply from his earnings, but from his income, not from his earnings in the employ of this company, but his earnings from all sources which enabled him to contribute one hundred dollars a month, which is wholly undisputed. His expectancy was twenty-six years. It cannot be expected that he would follow this employment up to the very moment of his death, but say that twenty years of this he would be able to go on in his employment, and there is some prospect for promotion for a man in the railway mail service as well as elsewhere. It shows that he had received a promotion only a few months before——

"Mr. BAGLEY: We object to the remarks of counsel that the jury are to consider any evidence concerning the matter of promotion of this deceased, there is no evidence in the record to support it.

"Mr. AGEE: The evidence shows that he had a short time before received a promotion and it is fair to presume that a man in the long service this man gave might receive other promotions and I say it is a legitimate and proper conclusion.

190 "Mr. BAGLEY: We assign the remark of counsel as objectionable and misleading, and ask the court to instruct the jury that such is not an element of damage—the jury may not consider a possible element of promotion.

"The COURT: Objection overruled.

"Mr. BAGLEY: To which we take an exception."

Second. That during the closing argument to the jury Mr. Schlesinger, one of the plaintiffs' counsel, in discussing to the jury the right of the deceased to travel on his official commission or credentials, after reading of the same, made the following prejudicial remarks as taken down and transcribed by the official court stenographer: "And this commission, good for the entire year, this commission, this paid for transportation, this piece of paper for which this railroad company received value, entitled Charles Albert Schuyler to travel anywhere between any stations, no matter how small or how large, within the six states named upon it.

Mr. BAGLEY: If the court please, I object to the remark of counsel in stating that the commission entitled him to travel any place and anywhere, unless that statement is limited by the qualification that when he was on duty, unless he limits that.

Mr. SCHLESINGER: I do decline to limit anything. I am arguing this case legitimately, making proper inferences and reading from the paper itself, and I do object to these constant interruptions, which are only made, in my judgment, to vex and annoy me, and if the jury like it all right.

The COURT: Of course the court has covered that by an instruction to the jury.

Mr. SCHLESINGER: I am commenting, if your honor please, upon this piece of evidence, and I repeat that under this commission——

Mr. BAGLEY: Now, I object——

191 Mr. SCHLESINGER: Am I not allowed to read what appears upon the piece of paper?

The COURT: Yes, but the court has limited the effect of that paper by instructing the jury that he must be traveling——

Mr. SCHLESINGER: This commission.

Mr. BAGLEY: I ask the court's ruling.

Mr. SCHLESINGER: Never in the course of twenty years' experience have I been so interrupted by counsel on the other side.

The COURT: Of course he has a right to interrupt counsel if counsel is stating something which is not apparent in the evidence.

Mr. SCHLESINGER: I haven't gone beyond this evidence yet, I said that he was allowed to travel between those stations at any time and within those states named upon this commission. Does your honor claim that he is not?

The COURT: When in the performance of his duty.

Mr. SCHLESINGER: Undoubtedly, when in the performance of his duty.

The COURT: With that modification it is all right."

Third. That during his closing argument to the jury Mr. Schlesinger, the same counsel for plaintiffs, while commenting on the testimony of the witnesses Mr. Stephens and Mr. Rhodes, as taken for the defendant by depositions, in San Francisco, California, and as given by the same witnesses orally at the trial, made the following prejudicial remarks, as taken down and transcribed by the official court stenographer:

"Mr. SCHLESINGER: Now, there was a deposition taken in this case for the railroad company, of Mr. Stephens and Mr. Rhodes, taken in San Francisco; but the plaintiffs in this case brought these men into the court room. You have heard their testi-
192 mony, and you men, as impartial and fair minded men, after having heard their testimony, were compelled to conclude that the plaintiff has absolutely established her case beyond any definite question. What does Mr. Stephens say in this testimony taken before you gentlemen, under the direction of his honor, and this will control you in your verdict. I will read from page six."

And again, after reading to the jury from the reporter's transcript of the testimony of these witnesses, given at the trial, the same counsel for plaintiffs made the further prejudicial remarks, as taken down and transcribed by the official court reporter: "Now upon page six—in case you care to call for that testimony, page six of the testimony given right here in this court before your eyes and within your hearing, and not given off in San Francisco, where occasionally some queer things are done, in my state and my city——

Mr. BAGLEY: I object; I contend if the court please——

Mr. SCHLESINGER: I withdraw the remark.

Mr. BAGLEY: I assign the remark of counsel as error, and ask the court to instruct the jury at this time to disregard it.

The COURT: Of course they will disregard it, and I will instruct them to disregard it, as it has been withdrawn."

JNO. G. WILLIS.

Subscribed and sworn to before me this 31st day of August, 1908.

L. B. SWANER,
Notary Public.

Served and filed August 31, '08.

193 That said motion for new trial was afterwards, to-wit: on the — day of October, 1908, submitted to said court and by the court taken under advisement.

And, thereafter, to-wit: on the 4th day of January, 1909, the said court did overrule and deny said motion for new trial, of which the defendant had notice on the 6th day of January, 1909.

194 The foregoing Bill of Exceptions was served upon us, this the 16th day of January, 1909.

AGEE & McCRACKEN,
Attorneys for Plaintiffs.

The foregoing Bill of Exceptions was returned this the 21st day of January, 1909, with attached amendments offered or proposed.

AGEE & McCRACKEN,
Attorneys for Plaintiffs.

The foregoing Bill of Exceptions was, together with attached amendments, received on return this January 21st, 1909.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
E. M. BAGLEY,
Att'ys for Def't.

On this, the 25th day of January, 1909, and within the time allowed by law therefor, the plaintiff having returned the foregoing Bill of Exceptions, with amendments offered and proposed thereto by the said plaintiff, which said amendments the defendant allows, the defendant now presents said bill of exceptions, in the foregoing entitled cause, and prays that the same may be allowed and settled, and signed by the court, as a true and correct Bill of Exceptions; and as containing defendant's petition for removal and order denying same, and all the evidence adduced on the trial of said cause; together with the proceedings, orders and rulings of the court made therein, and during the trial thereof.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
E. M. BAGELY,
Attorneys for Defendant.

195 In the District Court of the Second Judicial District of the State of Utah in and for Weber County.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Now, on this 21st day of January, 1909, the plaintiff returns to the defendant its proposed bill of exceptions and proposes the following amendments thereto:

Strike out all of page 3 of the reporter's transcript of the proceedings, except the first two lines on said page; and also all of page 4 and the first ten lines of page 5 of said transcript, being the open

ing statement by counsel for the respective parties and being superfluous and unnecessary and not being proper to be included under sections 3284 and 3286 of the Compiled Laws of Utah, 1907. Also strike out all of page 97 of said transcript, except the first five lines, all of page 98, and twenty two lines beginning at the top of page 99, being merely the argument of counsel upon an objection stated to the admission of certain testimony, and not being proper to be included in a bill of exceptions under sections 3284 and 3286 of the Compiled Laws of Utah, 1907. Also strike out the transcript of all instructions given by the court and all requests for in-
196 structions by plaintiff and defendant, from page 109 and page 125 inclusive, and the first three lines of page 126 of the reporter's transcript, the same being unnecessary and not properly a part of the bill of exceptions, all instructions and requests being a part of the judgment roll.

AGEE & McCRACKEN,
Attorneys for Plaintiff.

197 *Certificate.*

It is hereby certified that the foregoing bill of exceptions in the above entitled case, contains a full, true, and correct transcript of all the evidence adduced on the trial hereof, together with the petition on removal (the same being accompanied by a bond in the sum of one thousand dollars ($1,000.00) with sufficient sureties); also, all orders and rulings made by the court during said trial; and the plaintiff having proposed certain amendments to said bill of exceptions, and, upon offer thereof, the same were by the defendant allowed. The court, after amending said bill of exceptions to accord and agree with said proposed amendments of plaintiff, now hereby allows, signs and settles said bill as a true and correct bill of exceptions in said case.

J. A. HOWELL, *Judge.*

Dated this, the 25th day of January, 1909.

198 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, Defendant.

Notice of Appeal.

To Messrs. Agee & McCracken and Bert Schlesinger, Attorneys for Plaintiffs:

Please Take Notice That the Southern Pacific Company, defendant in the above entitled cause, hereby appeals to the Supreme Court

of the State of Utah, from the judgment rendered and entered in said District Court on the 4th day of January, 1909, in favor of said plaintiffs and against said defendant, and from the whole thereof.

P. L. WILLIAMS,
GEO. H. SMITH,
JNO. G. WILLIS,
Attorneys for Defendant.

Service of the above, and receipt of a copy thereof, are hereby admitted, this, the first day of April, 1909.

AGEE & McCRACKEN,
Attorneys for Plaintiffs.

Endorsed: Second District Court, Weber County, Utah. Filed Apr. 2, 1909. S. G. Dye, Clerk.

199 In the District Court of the Second Judicial District of the State of Utah in and for the County of Weber.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC COMPANY, Defendant and Appellant.

Certificate.

STATE OF UTAH,
County of Weber, ss:

I, Samuel G. Dye, clerk of the district court of the second judicial district in and for the County of Weber, State of Utah, do hereby certify that the above and foregoing is the original judgment roll in the above entitled action, filed August 20th, 1908, the original petition for removal of said cause from this to the United States Circuit Court for the district of Utah, filed April 16th, 1908, and Bond accompanying the same, and the order of the court denying said petition, said order being dated May 9th, 1908; the original notice of the intention of the defendant, Southern Pacific Company to move for a New Trial of this action, filed August 24th, 1908; a certified copy of the order of the court, denying the motion of the defendant for a new trial of this action, entered upon the minutes of the court on January 4th, 1909; the original bill of exceptions filed after settlement, January 25th, 1909, the original notice of appeal filed by the defendant in said action on April 2nd, 1909, and that all of the foregoing are transmitted to
200 the Supreme Court of the State of Utah, pursuant to such appeal.

And I further certify that an undertaking on appeal in due form has been properly filed, the same having been filed on April 2nd, 1909.

Witness my hand and the seal of said court this 3rd day of April, A. D. 1909.

[SEAL.] SAMUEL G. DYE, *Clerk.*

201 In the Supreme Court of the State of Utah.

MARY R. SCHUYLER et als., Respondents,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant.

Assignment of Errors.

The appellant assigns the hereinafter as the errors committed by the trial court, upon which it will rely for a reversal of this case in this court:

I.

The said court erred in denying appellant's petition for removal of said cause from said district court to the Circuit Court of the United States; and likewise erred in making and entering its order refusing to allow said petition and to remove said cause.

(Trans. pp. 9, 15 and 77-80; Abst. p. —).

II.

The court erred in overruling appellant's demurrer to said complaint; and it likewise erred in overruling said demurrer on each specific ground of demur. (Trans. p. 17-20; Abst. p. —).

III.

The court erred in admitting, over appellant's objection plaintiff's Exhibit "A". (Trans. p. 84-7; Abst. p. —).

202 III — A.

The court erred in overruling appellant's objection to the following question:

Q. "Was he (the conductor) facing, or how was he standing with reference to Mr. Schuyler as he entered?"

Objected to as incompetent, irrevelant, and immaterial.

Objection overruled. Exception.

A. "The truck was in front of him, and he was standing with his hand on the back part of the truck facing the engine when Mr. Schuyler passed in front of him into the mail car."

(Trans. pp. 103-5; Abst. —).

IV.

The court erred in overruling appellant's objection to the following question:

Q. "What were the duties of the Assistant Chief Clerk, Mr. Schuyler at Ogden?"

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. "Mr. Schuyler was assistant to Chief Clerk Rhodes at Ogden, and performed all the duties assigned to him, office duties assigned to him by the chief clerk, in addition to that, took the place of the chief clerk in the chief clerk's absence and became the acting chief clerk, with all of the powers of chief clerk; performed all of the duties of the chief clerk, had the general duties assigned him of overseeing of the service."

(Trans. p. 119; Abs. p. —).

V.

The court erred in overruling appellant's objection to the following question:

Q. "Well, with respect to the mail car, what if any duty would the assistant chief clerk have to perform there?"

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

203 A. "Whenever a chief clerk or an assistant chief clerk—and this applies to Mr. Schuyler, if you want him particularly—must pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mail is under his care and carries with it the responsibility to all officials of the service."

(Trans. p. 120; Abs. p. —).

VI.

The court erred in overruling appellant's objection to the following question:

Q. "Now, Mr. Stephens, if the assistant chief clerk or the chief clerk, as the case may be, has entered a postal car and there observed the work of the helpers and he has some complaint to find, how would he make that complaint?"

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. "The duty of the assistant chief clerk, or any assistant chief clerk, if he comes in contact with the postal clerks, whether or not he finds an irregularity, is to make a report to his chief clerk immediately upon his return."

(Trans. p. 123-124; Abs. p. —).

VII.

The court erred in overruling appellant's objection to the following question:

Q. "What were the duties of an assistant chief clerk, or what were his duties rather?"

Objected to as calling for a conclusion.

Objection overruled. Exception.

A. "The duties of the assistant chief clerk in the office at that time were, as the title implies, an assistant to the chief clerk in the performance of the duties and attending to any matters that might be assigned to him by the chief clerk."

(Trans. p. 132-133; Abs. p. —).

204 VIII.

The court erred in overruling and denying appellant's motion for a directed verdict; and in refusing to direct the jury to return a verdict in favor of defendant.

(Trans. p. 185, 187 and 188; Abs. p. —).

IX.

The court erred in overruling and denying defendant's motion for a special verdict.

(Trans. p. 187; Abs. p. —).

X.

The court erred in overruling appellant's objection to the argument of counsel for plaintiff, as disclosed on page 206 of the transcript.

XI.

The court erred in overruling defendant's objection to the remarks made during the argument of counsel for plaintiff-, as disclosed on pages 207 to 211 inclusive.

XII.

The court erred in refusing to instruct the jury as requested in defendant's instruction numbered 1.

(Trans. p. 36, 212; Abs. p. —).

XIII.

The court erred in refusing to instruct the jury as requested in defendant's offered instruction numbered 2.

(Trans. p. 38, 213; Abs. p. —).

XIV.

The court erred in refusing to instruct the jury as requested in defendant's offered instruction numbered 3.

(Trans. p. 38, 212; Abs. p. —).

XV.

The court erred in refusing to instruct the jury as requested in defendant's offered instruction numbered 4, which reads as follows:

205 "The court instructs you that the commission issued by the government to said Charles Albert Schuyler, and upon which he was riding at the time of the accident complained of, was a request on the defendant company made by the government to transport said Schuyler only when he was engaged wholly in the performance of his official duties, and not otherwise."

(Trans. p. 39, 212; Abs. p. —).

XVI.

The court erred in refusing to instruct the jury as requested by defendant's offered instruction numbered 5.

(Trans. p. 40, 213; Abs. p. —).

XVII.

The court erred in refusing to instruct the jury as requested by defendant in its offered instruction numbered 6.

(Trans. p. 41, 213; Abs. p. —).

XVIII.

The court erred in refusing to instruct the jury as requested by defendant in its offered instruction numbered 7.

(Trans. p. 41, 213; Abs. p. —).

XIX.

The court erred in refusing to instruct the jury as requested by defendant in its offered instruction numbered 12, reading as follows:

"I further instruct you that in considering the probable value of the life of Charles Albert Schuyler to these plaintiffs, you have no right to take into consideration any possible opportunity that he might have had of acquiring wealth or fortune in the future by change of circumstance in life."

(Trans. p. 45, 213; Abs. p. —).

206

XX.

The court erred in instructing the jury as contained in its instruction numbered 1, as follows:

"The court charges you that an assistant chief clerk in the railway postal service of the United States Government employed and engaged in the service of the government, if traveling on a railroad train in his position under contract between the Government and the carrier for the carriage of mail, and if performing his duties thereon as such assistant chief clerk on said train, is a passenger for hire, to whom the carrier owes the same duty that he owes to passengers traveling in passenger cars, so far as its liability for personal injury arising from its negligence is concerned."

(Trans. p. 50, 213; Abs. p. —).

XXI.

The court erred in instructing the jury, in its instruction numbered 2, reading as follows:

"I charge you that the presumption is that he was there lawfully and rightfully."

(Trans. p. 51, 214; Abs. p. —).

And the court likewise erred in instructing the jury in its instruction numbered 2, reading as follows:

"In the discharge of his official duties as such employe and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence."

(Trans. p. 51, 214; Abs. p. —).

XXII.

The court erred in instructing the jury in that part of its instruction numbered 3, which reads as follows:

"If you find from the testimony that the said Charles Albert Schuyler, was a passenger within the meaning of the definition heretofore given you."

(Trans. p. 52, 214; Abs. p. —).

And the court likewise erred in instructing the jury in
207 that part of its instruction numbered 3, which reads as follows:

"If you find that the deceased, Charles Albert Schuyler, was at the time and place in question herein a passenger on defendant's line of railroad, within the purview of the instructions heretofore given."

(Trans. p. 52, 214; Abs. p. —).

Also in that part of said instruction numbered 3, which reads as follows:

"And that this admission raises the presumption of the negligence of the defendant and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from the improper construction of the track, failure to keep the track in proper repair, or negligence in operation."

(Trans. p. 52, 215; Abs. p. —).

XXIII.

The court erred in entering judgment on the verdict returned herein.

(Trans. p. 62; Abs. p. —).

XXIV.

The court erred in overruling defendant's motion for a new trial.

(Trans. p. 64, 219 and 227; Abs. p. —).

P. L. WILLIAMS.
GEO. H. SMITH,
JNO. G. WILLIS.

Endorsed: No. 2034. Mary R. Schuyler, et al. v. Southern Pacific Co. Assignments of Error. Filed April 14, 1909. H. W. Griffith, Clerk.

208 In the Supreme Court of the State of Utah, Regular May Term, 1909, May 25, 1909.

MARY R. SCHUYLER, RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Respondents.

v.

SOUTHERN PACIFIC COMPANY, Appellant.

Submission.

This cause coming on regularly for hearing, was argued by Mr. E. M. Bagley and Mr. Jno. G. Willis in behalf of the appellant; by Mr. A. W. Agee, in reply, was submitted, and by the court taken under advisement.

209 In the Supreme Court of the State of Utah, Regular May Term, 1909, August 27, 1909.

MARY R. SCHUYLER, RHEA SCHUYLER, EDWARD SCUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby, reversed, and the cause remanded for a new trial.

210 In the Supreme Court of the State of Utah.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

STRAUP, *C. J.*:

1. This is an action brought by the plaintiffs and respondents to recover damages for the death of Charles A. Schuyler alleged to have been caused by the defendant's negligence while a passenger on

one of defendant's trains. A verdict was rendered for the plaintiffs on the 20th day of August, 1908. It is not made to appear when the judgment was entered. It is shown that the judgment was recorded on the 17th day of December, 1908. A notice of appeal was served and filed the 1st day of April, 1909. The statute provides that an appeal may be taken within six months from the entry of the judgment. While no motion is made to dismiss the appeal, it, nevertheless, is urged that we are without jurisdiction to entertain the appeal because it was not taken in time. It is assumed by the respondents that the judgment was entered on the day the verdict was rendered, and it is claimed by them that it is not shown by the bill of exceptions that a motion for a new trial was made, or if made, when it was overruled, and, therefore, it is not affirmatively made to appear that the appeal was taken within six months from the entry of the judgment, or the overruling of the motion for a new trial.

Though the judgment was entered on the day the verdict was
211 rendered, yet we think the appeal was in time, for it is sufficiently disclosed by the bill of exceptions that a motion for a new trial was made within time, and that it was overruled on the 4th day of January, 1909, at which time the judgment became final. The appeal was taken within six months from that time.

2. It is alleged in the complaint that the defendant is a common carrier of passengers for hire and owned and operated a railroad from Ogden, Utah, to San Francisco, California; that in connection with the business of carrying passengers for hire, the defendant had entered into engagements with the Government of the United States to transport and carry, between the points named, United States mail, mail clerks and employés employed in the railway mail service, including the deceased, for which the defendant received compensation from the Government of the United States; that it was necessary for the deceased, who was an assistant chief mail clerk, in the discharge of his duties to be in and ride on the mail cars operated by the defendant in carrying mails; and while he was "necessarily in a certain mail car" operated by the defendant in one of its trains from Oakland to Ogden, and while he was being so transported by the defendant "for a consideration and under arrangements between it and the Government of the United States," the train, between Garrney and Lucin stations, in Utah, was derailed through the defendant's negligence, and the deceased killed.

A petition was filed by the defendant to remove the case to the Circuit Court of the United States in and for the District of Utah, on the ground: "That the suit herein is of a civil nature at law, arising under the Constitution and laws of the United States, §8 of Article 1, declaring that Congress shall have power to 'establish postoffices and post roads;' also 'to regulate commerce
212 with foreign nations and among the several states.' Also under the Act of Congress of the United States, approved June 13, 1898, and June 9, 1896, and Acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and other officers of the postoffice department of the Government of the United States; also the Act of March 3, 1897, pertaining

to messenger service in connection with railroads, etc.; also Act of Congress of the United States, approved February 4, 1887, and Acts amendatory thereof, including the Act approved June 29, 1906." The court denied the motion to remove. Complaint is made of this ruling. It is especially urged by the appellant that plaintiffs' case necessarily involves a construction of §1, par. 4 of the Hepburn Act (34 Stat. L. p. 584; Fed. Stat. Ann. Supp. 1907, p. 169), which prohibits common carriers engaged in interstate commerce from issuing or giving free interstate transportation for passengers, except the persons and classes therein specified. It is contended that the case involves the question as to whether under the statute a clerk in the railway mail service of the United States, when not engaged in the discharge of his duties as a mail clerk, and when traveling for his own convenience and purpose wholly unconnected with any official duty, can lawfully be given free interstate transportation as in the act provided for the free transportation of railway mail clerks. The appellant claims that the statute forbids free interstate transportation for mail clerks in such case, and that the deceased on his trip from San Francisco to Ogden, when the derailment occurred, was so traveling for his own convenience wholly unconnected with any official duty, and that he was therefore not a passenger but a trespasser. It, however, is averred in the complaint that the deceased was transported by the defendant under arrangements between it and the Government of the United States by which the defendant engaged for a consideration and upon compensation
213 received by it from the Government of the United States to safely transport the deceased between the points named, and that the defendant, under such arrangement, had undertaken to so carry and transport the deceased. On the face of the complaint it is not made to appear that the deceased's right to transportation was acquired by virtue of the federal law referred to, nor that the construction of a federal law is involved, nor that plaintiffs' case is dependent upon a federal law. Nor is it alleged in the complaint that the deceased was not in the discharge of his public duties, nor that he was traveling for his own convenience. The allegations of the complaint show rather the contrary. To make a suit arise under a law of the United States the plaintiff must claim some legal right under such law to sustain his cause of action, which legal right is controverted by the defendant; and to make a case removable from the state court to the Circuit Court of the United States, under the present general statute, on the ground that it arises under a law of the United States, it must appear from the plaintiff's statement of his cause of action, in the initial pleading that it does so arise. (Moon on Removal of Causes, §§101, 104.) A case cannot be removed simply because in the progress of the litigation it may be necessary to give a construction to the Constitution or laws of the United States. It not being made to appear by the complaint that a federal law is involved, the court did not err in denying the motion for removal.

3. The suit was brought by Mary R. Schuyler, the deceased's widow, and his minor children by a guardian ad litem. The ap-

pointment of the guardian was alleged in the complaint. When the plaintiffs offered in evidence the order of the appointment, the defendant objected on the grounds that the statute only provides for the appointment of a guardian ad litem in a pending action, and then only for non-resident minor defendants; that the minor
214 plaintiffs were non-residents and that no action was pending when the order appointing the guardian was made. (Secs. 2907-8 C. L. 1907.) We think the statute contemplates and provides for the appointment of a guardian ad litem for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants.

4. In the defendant's answer it was admitted that the deceased was in the employ of the Government of the United States as a railway mail clerk, and that the defendant was a common carrier for the transportation of property and passengers for hire, as averred in the complaint, and "that contractual relations existed between the defendant and the Government of the United States with respect to the carrying of certain United States mail and certain employés of said Government to whom was entrusted the supervision and care of such mails as were by defendant transported under the agreement aforesaid, and that the defendant received compensation therefor." It denied the alleged negligence, and pleaded that the deceased was only entitled to be upon the mail cars when he was in the discharge of his duties as a mail clerk, and that he, without the consent and knowledge of the Government of the United States or the defendant, and in violation of the agreement existing between the defendant and the Government, and with the intent, and for the purpose of deceiving the Government and the defendant and avoiding the payment of fare, entered the mail car, and wrongfully, fraudulently, and in violation of law, and without the consent and knowledge of the defendant, remained in the car, and attempted to secure transportation therein, and while he was so wrongfully and fraudulently upon the car he received the injuries which resulted in his death. Upon these issues the court instructed the jury that if they found from the evidence that the deceased was traveling on the defendant's train and was not performing duties relating
215 to the mail service but was traveling "simply for his own purpose unconnected with any official duties," he was not a passenger for hire but a trespasser to whom the defendant would not be liable for the alleged negligence and resulting injury. The appellant contends that the evidence without dispute shows that the deceased was traveling on the defendant's train "simply for his own purpose unconnected with official duties," and that the verdict which was rendered by the jury was therefore contrary to the evidence and against the charge.

The evidence without dispute shows the following facts: In November, 1906, the deceased, who then lived at Oakland, California, and who was in the employ of the United States mail service at San Francisco, was appointed an assistant chief clerk of the railway mail service with headquarters at Ogden, Utah. The Postmaster General issued to him the following commission:

"Postoffice Department, Washington, D. C.

To Whom Concerned:

The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk, railway mail service, with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the second assistant postmaster general and countersigned by James E. White."

This was signed by G. B. Cortelyou, the postmaster general, and countersigned by James E. White, general superintendent. On the opposite page were the words: "Good between all stations Utah, Idaho, Nevada, California, Montana and Colorado." The position to which the deceased was appointed embraced the territory of Utah, a portion of Montana and Idaho, and a small portion of Nevada and Colorado. It did not include any portion of California. The chief clerk at Ogden, the assistant chief clerk, and all mail clerks running between San Francisco and Ogden, were under the supervision of the general superintendent at San Francisco. The superintendent testified that the deceased was required to perform:

216 "All of the duties assigned to him (by the chief clerk at Ogden), office duties assigned to him by the chief clerk, in addition to that, took the place of the chief clerk in the chief clerk's absence, and became the acting chief clerk, with all of the powers of chief clerk; performed all the duties of the chief clerk, had the general duties assigned him of overseeing the service. * * * The chief clerk, or assistant chief clerk" was required to "pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mail is under his care, and carried with it the responsibility to all officials of the service. * * * All officials of the service are expected and are instructed to pay particular attention to the service, whether or not it comes within his particular scope.. * * * We have general unwritten laws or regulations requiring every official of the service to be on watch regarding the service. * * * The chief clerk at Ogden had jurisdiction only over the helpers running west on the line on which the accident happened. * * * All postal clerks work directly under the chief clerk of the local district. The chief clerk is required to report at the end of the probationary term of the clerk, as to his fitness for permanent employment. On that report I base my recommendation to the department at Washington, and the report of the chief clerk determines, in a large measure, whether or not the clerk shall be retained. The duty of the assistant chief clerk, if he comes in contact with the postal clerks, whether or not he finds an irregularity, is to make a report to his chief clerk

immediately upon his return. Blank forms are furnished to all offices for such purposes."

The chief clerk at Ogden testified:

"The duties of an assistant chief clerk were an assistant to the chief clerk in the performance of the duties and attending to any matters that might be assigned to him by the chief clerk. At any time he would be on the road he would be expected to ride in the mail car and take notice of anything that would be for the improvement or betterment of the service, either in the plan of work pursued by the clerks or the distribution."

The deceased, at Ogden, received a telegram from Oakland announcing the death of his child. With the permission of the chief clerk at Ogden he took the first fast mail train for California. The chief clerk furnished him a portable cot, blankets and bedding to occupy quarters in a mail car. When he left Ogden for Oakland there was no official business requiring him to make such a trip. No instructions were given him in respect of any business or duties pertaining to the service. The chief clerk at Ogden, in supervising the business of his territory, was required, from time to time, to go on the road on official business. But he had always performed such duties himself. The performance thereof had at no time
217 been required of the deceased. When the deceased arrived at San Francisco he there called on the general superintendent and informed him of the death of the deceased's child. No matters were discussed, and no transactions were had relating to the mail service. Nothing was talked about between them except the deceased's misfortune and bereavement. The superintendent inquired of him when he intended to return to Ogden. He answered, the following day. They discussed the train which he would take and the time he would reach Ogden. On the 12th day of January, 1907, the deceased, on his return trip, at Oakland, in the presence of the train agent and the conductor in charge of the train about to leave for Ogden, entered a mail car with his grips. The evidence of his right to transportation on the defendant's train was the commission issued by the postmaster general. There were some mail clerks in the car. He, however, had no supervision or direction over them. While it is made to appear that in going from Ogden to Oakland, and in returning from Oakland to the place of the derailment, the deceased traveled in a mail car, yet it is not made to appear what, if anything, he did in the mail car, or that he rendered any service, or performed any duties pertaining to the railway mail service. We think the only conclusion authorized from the evidence is, that he was traveling in the mail car on account of matters personal to himself and wholly unconnected with his service to the Government. We do not say that the commission issued to the deceased, if recognized and accepted by the defendant, did not entitle him, in such case, to the transportation in question, or if the commission was recognized and accepted by the defendant, and by virtue of it the defendant assumed and undertook to carry and transport the deceased, and he in good faith believed the commission entitled him to the transportation, that the deceased

was a trespasser on the defendant's train, or that it was not
218 liable to the plaintiffs for the consequences of its alleged negligence, though under the Hepburn act the defendant could not lawfully give him free transportation, except when he was on duty. But in the complaint it is in effect alleged that the defendant had agreed and received compensation to carry the deceased when he was in the discharge of duties as clerk of the railway mail service and that the deceased was in the mail car in the discharge of such duties. The defendant admitted that it had entered into arrangements with the United States Government to carry the deceased in such case, but alleged that he was not in the discharge of duties and had not entered the car for any such purpose but on the contrary had entered the car and knowingly and fraudulently and without the knowledge or consent of the defendant attempted to ride therein in violation of the defendant's agreement with the Government to carry mail clerks. The court gave the jury binding instructions to render a verdict for the defendant if they found that the deceased was traveling in the mail car and was "not performing any of his duties as such assistant chief clerk on said train," but was traveling "simply for his own purposes unconnected with any official duties." The court conditioned the right of recovery upon the performance of such duties on the train by the deceased, regardless of all other questions. It was the duty of the court to instruct the jury in matters of law; and the jury, as matter of duty, were bound to follow the instructions. Right or wrong, they were the law of the case for the jury to obey and follow. This they did not do. We find no evidence to warrant a finding of the condition upon which the court instructed the jury the plaintiffs could recover.

In this connection the court also charged the jury that it was undisputed that the deceased was an employé of the railway mail service, and that at the time of the injury he was in a mail
219 car "on the defendant's line of road, and I charge you the presumption is that he was there lawfully and rightfully, in the discharge of his official duties as such employé, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence," but that the presumption would be overcome if it was shown by affirmative proof and by a preponderance of the evidence that he was not in the discharge of his official duties. The relation of carrier and passenger for hire between the defendant and deceased was in effect alleged by the plaintiffs, or such a relation as gave the deceased rights of a passenger and imposed upon the defendant corresponding duties and obligations of a carrier of passengers. Such a relation was denied by the defendant. The burden was upon the plaintiffs, not the defendant, to establish it. That burden did not shift, but rested upon the plaintiffs throughout the case. And if upon all the evidence it was not established by a fair preponderance, the plaintiffs, and not the defendant, must fail. The charge of the court is not only in conflict with these well recognized principles, but also invaded the province of the jury on the weight to be given a mere inference of fact. It in effect told the jury that a certain presump-

tion of law arose, that is, that a definite probative weight in law attached by reason of certain undisputed facts and that the burden was cast on the defendant to overcome it by affirmative proof and by a preponderance of the evidence. What the court thus incorrectly characterized a presumption of law by instructing the jury to give it a definite probative effect, was, at most, a mere inference of fact, and a fact, too, which, under the charge of the court and the law of the case as given the jury, was essential to plaintiff's right of recovery. That is to say, the court, in other portions of the charge, bound the jury to find that the deceased was in the discharge of his duties as a mail clerk before they could properly render a verdict for the plaintif-s, and here told them
220 that such fact was established as matter of law by the undisputed proof of certain other facts, and then cast the burden on the defendant to overcome such presumption by affirmative proof and by a preponderance of the evidence that the deceased was not in the discharge of his duties. An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by direct evidence of the testimony of witnesses or indirect evidence of inference and presumptions, does not cast the burden on the other party to prove the negative, but the onus probandi in either case remains throughout with him who has the affirmative. The court, therefore, in directing the jury to give a definite probative effect to the admitted facts, and in casting on the defendant the burden of proving the negative to overcome such effect, committed error.

It is not necessary to express an opinion on the question presented as to whether the Hepburn act permits an interstate carrier to give free interstate transportation to railway mail clerks when not on duty, for the reason that it is alleged in the complaint and admitted in the answer that the arrangement existing between the defendant and the Government of the United States for the transportation of the deceased was for hire and when he was in the discharge of duties in the railway mail service. It was alleged in the complaint and denied in the answer that he was in the discharge of such duties. With respect to the relation between the defendant and the deceased that was the only issue submitted to the jury. And, as already held by us, we do not find sufficient evidence to support the verdict which was rendered thereon.

For the reasons given, the judgment is therefore reversed and the case remanded for a new trial. Costs to appellant.

We concur:

J. E. FRICK, *J.*
W. M. McCARTY, *J.*

221 In the Supreme Court of the State of Utah.

MARY R. SCHUYLER, RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

Order Granting a Rehearing.

In this cause it is ordered that Respondents' petition for a rehearing herein be, and the same is hereby granted.
Regular October Term, 1909. November 5, 1909.

222 In the Supreme Court of the State of Utah.

Regular February Term, 1910.

MARCH 15, 1910.

MARY R. SCHUYLER, RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Foristall, their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

This cause coming on to be heard on the re-hearing heretofore granted, was argued by E. M. Bagley, Esq., in behalf of appellant; by Mr. A. W. Agee, in reply, was submitted and by the court taken under advisement.

Regular May Term.

JUNE 2, 1910.

Title of Court and Cause.

Judgment.

A rehearing having been heretofore granted in the above entitled cause, and the matter having been heretofore argued and submitted, and the court being sufficiently advised in the premises, it is ordered, adjudged, and decreed, that the judgment of the court below be, and the same is hereby affirmed, with costs.

223 In the Supreme Court of the State of Utah.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

On Rehearing.

STRAUP, *C. J.*:

A petition for rehearing was filed on behalf of respondents. They urged that we had overlooked evidence tending to show that the deceased was traveling in the mail car in the discharge of his duties. They further urged, that though he was not in the discharge of his duties, nevertheless, upon the undisputed evidence, showing that the appellant received him as a passenger and as such undertook to carry and convey him and that his death was caused by its negligence, the respondents were entitled to recover as matter of law. A rehearing was granted, and the case reargued and resubmitted.

We have reread the record and again reached the conclusion that there is no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance, of duties pertaining to the Railway Mail Service. Upon the evidence adduced the only permissible inference is, that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of such a mission when the train was derailed. Whatever presumption might be indulged
224 under other circumstances that he was in the discharge of railway mail duties from the facts that he was a railway mail clerk and was in a mail car, is entirely overcome by the affirmative and direct showing that there was no business or engagement relating to his service which occasioned, or required, the trip to be made by him; that no directions, instructions, or requests, were given to or made of him in respect thereof; that duties on the road had theretofore always been performed by his chief and not by the deceased; and that the trip was occasioned solely on account of the death of his child.

The other proposition is more difficult. The claims made by the respondents in that regard are: (1) That under the Hepburn Act the appellant could lawfully give, and the deceased receive, free transportation, it being conceded that he was a Railway Mail service employé, though he was not on duty and was traveling on account of mere personal matters; and (2) though the act did not permit the giving of free transportation in such case, and though the appellant could not lawfully permit the deceased to be carried on its train by virtue of the commission which was issued to him unless he was on duty, nevertheless, the appellant, having received the deceased upon its train and permitted him to ride in the mail car, and by virtue of the commission undertook to transport him as a

passenger regardless of the question whether he was or was not on duty, must be held responsible for the breach of duty so assumed and undertaken by it, to the same extent that it is liable to passengers for hire. On the other hand, it is asserted by the appellant, that the respondents, having alleged in the complaint that the deceased was in effect a passenger for hire arising out of particular alleged facts—a contract between the government and the appellant to carry mails and mail clerks, including the deceased, for which appellant received and was paid compensation, and that under
225 such arrangement, and for such consideration, the appellant had undertaken to carry the deceased from Oakland to Ogden; that the deceased in the discharge of duties as a railway mail clerk was required to be in the mail cars operated by the appellant and "was in said car with the knowledge and consent of the said defendants, its agents and servants, as such clerk, and in the discharge of duties as such" at the time of the derailment—must recover, if at all, upon proof of the particular relation of passenger and carrier as alleged, and that they cannot be permitted to recover on the theory that the deceased was a gratuitous or other passenger; that under the Hepburn Act neither the appellant nor its agents in charge of its train could lawfully permit the deceased to ride on his commission when he was not on duty, nor could it or its agents otherwise lawfully permit him to ride gratuitously; and since the deceased was riding on appellant's train by virtue of his commission when not on duty, he was engaged in the commission of an act in violation of law, and was hence a trespasser to whom appellant owed no duty except to refrain from wilfully injuring him.

It undoubtedly is true, that a plaintiff may not declare on one theory and recover on the proof of another. He may not, for instance, declare on one or several alleged acts of negligence, and recover on the proof of another or others. So, in a complaint, a plaintiff seeking to recover from a carrier for the negligent killing of a passenger, no recovery can be had unless the relation of carrier and passenger is shown, although the facts are such as to warrant a recovery in the absence of such relation for ordinary negligence in injuring a person, not a passenger. The duty owing, the measure of liability, and the degree of care required are different. (Chicago & E. I. R. Co. v. Jennings, 54 L. R. A. 827.) If, therefore, in the complaint a particular kind of passenger is alleged, may
226 recovery be had on the proof of a different kind? That is, if in the complaint it is alleged that the passenger was one for hire, may recovery be had if the proof shows that he was a gratuitous passenger?

The rule at common law obtained, and, as stated in 1 Chitty on Pleadings, p. 392, that "if the plaintiff, though needlessly, describe a tort and the means adopted in effecting it with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance which will occasion a nonsuit." But, by # 3001, 3002 and 3003, C. L. 1907, it is, by our code, provided: "No variance between the allegations in a pleading and the proof

is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

"Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

"Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof."

In speaking of such codes, Mr. Bates, in his work on pleading and practice, Vol. 1, p. 512, says:

"Under the Code no variance is material unless it has actually misled the adverse party to his prejudice on the merits, and no allegation is material unless essential to the claim or defense.

"The evident object of the Code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case on the evidence outside of the pleadings, and if objection be made to allow the pleading to be conformed to the evidence, at once and without terms, and where there is no objection to refuse to reverse on account of the variance."

Had respondents merely averred that the appellant was a common carrier of passengers, that the deceased was a passenger on one of its trains, and that it had assumed and undertaken to transport him as such, such allegations would have been sufficient to show the relation of passenger and carrier and the duties of a carrier owing by it to him; and any evidence would have been permissible thereunder which tended to show the relation of carrier and passenger, whether for hire or that of a gratuitous passenger.

227 Birmingham Ry. Lt. & P. Co. v. Adams (Ala.) 40 So. 385;
Lemon v. Chanslor, 68 Mo. 340;
The Ohio & M. R. Co. v. Craucher, 132 Ind. 275;
Gulf, Colo. & S. Fe R. Co. v. Wilson, 11 L. R. A. 486;
2 Bates Pl. & Pr. 1174.

In the case of Gulf, Colo. & S. Fe R. Co. v. Wilson, supra, it was held that proof that plaintiff was a United States mail agent on defendant's car in charge of mail, under an allegation that he was a passenger, does not constitute a variance. Nor are such general averments of the relation of carrier and passenger, as stated, open to the objection that they are statements of mere conclusions. (The Ohio & M. R. Co. v. Craucher, supra.) If the duties imposed by law for the carriage of a passenger for hire were other than, or different from, those imposed for the carriage of a gratuitous passenger, or if a different or higher degree of care was required in the one than in the other, it can readily be seen that no recovery could be had under an averment that the injured person was a passenger

for hire on proof that he was a mere gratuitous passenger. But it is now well settled that there is no difference in the degree of care required of carriers, nor in the measure of liability, in the transportation of passengers for hire and gratuitous passengers. It was wholly unnecessary for respondents to aver with minuteness the particular facts, as was done, upon, or out of which, the relation of carrier and passenger was based or grew. There must, of course, be sufficient averments, and evidence to support a finding, of the relation of carrier and passenger, else no recovery can be had. The essential, in its general scope and meaning, is the averment and proof of that relation. It undoubtedly was sufficiently averred in the complaint, and though the evidence does not support the
228 averment that the deceased was on the defendant's train in the discharge of duties pertaining to the Railway Mail Service, and hence does not show that he was a passenger for hire, as was in effect averred, nevertheless it does support a finding of the relation of carrier and passenger; that is, the evidence does support a finding that the appellant received and accepted the deceased for the purpose of being conveyed in the mail car from Ogden to Oakland and from Oakland to Ogden, and that it undertook to so transport him in virtue — or by reason of the commission held by him.

The further question to be determined is, whether such relation, and appellant's undertaking to transport the deceased, and its alleged breach of duty resulting in his death, are so conclusively made to appear as to entitle the respondents to a directed verdict on such issues. If they were entitled to such a direction, then the errors committed by the trial court, and referred to in our opinion on the former hearing, are harmless. That the car was derailed through the negligence of appellant as alleged in the complaint, and that the deceased was killed by reason of such derailment is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject. The serious question is, does the evidence conclusively show the relation of carrier and passenger? On such question we think the following facts are conclusively made to appear.

The deceased, who was a railway mail clerk in the service of the government of the United States, left Ogden and went to Oakland solely on account of the death of his child. He remained at Oakland a few days; when there, he went on board appellant's
229 train on his return trip. When he left Ogden he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which, on its face, entitled him to transportation between all stations in Utah, Nevada, and California. The commission, on its face, granted "the facilities of free transportation on the lines named," regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn Act took effect. The derailment and the deceased's death occurred fourteen days after the act took effect. It was admitted by

the parties on the trial that the deceased used the commission on the trip "as the evidence of his right to ride—the evidence of his right of transportation," and that no question would be raised with respect to the exhibition of the commission to the conductor in charge of the train. The deceased, at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent, at least without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are, that the deceased, both in going to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as "the evidence of his right of
230 transportation." There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was, therefore, not a trespasser. To be a trespasser, it was essential that his presence on appellant's train was without its knowledge or consent, or was gained or obtained through fraud or deceit.

Now, what legal liability attaches for an injury inflicted upon one through the carrier's negligence in being transported under such circumstances? The appellant asserts not any, for the Hepburn Act forbids such a transportation when the deceased was not on duty. Section 1, par. 4, of the act (34 St. L. P. 584; Fed. Stats. Ann. Sup. 1907, p. 169), is as follows:

"No common carrier subject to the provisions of this Act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, attorneys-at-law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies, to railway mail service em-

ployés, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is
231 interested, persons injured in wrecks, and physicians and nurses attending upon such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families. nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for such offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

Before the passage of this act, it, of course, was lawful for a carrier to give free interstate transportation for passengers; and while there is no direct evidence of it in the case, we think, from what was made to appear in argument, we may assume that before this act took effect commissions to Railway Mail Service employés were honored by carriers on the lines designated thereon, and such employés given the facilities of free transportation, whether on duty or not. And upon the record, we think we are justified in assuming that after the act took effect, and at the time of the transportation in question, the appellant and the deceased, in good faith, believed that the provisions of the Hepburn Act did not forbid a carrier from transporting a Railway Mail Service employé on his commission issued to him, and over the lines designated thereon, though he was not on duty. This assumption, of course, is wholly immaterial to the construction of the act, but it is important as bearing on the question whether the deceased was riding on the mail car with appellant's consent or against its will. In June, 1907, about five months after the derailment, in response to an inquiry made of them, the members of the Interstate Commerce Commission expressed their views that under the Hepburn Act
232 a carrier who knowingly permitted Railway Mail Service employés to use, and that such employés who accepted, free transportation when not in the discharge of their public duties, and when travelling unofficially, and for their personal benefit or pleasure, would subject themselves to the penalties of that act. This conclusion was reached upon a classification of the persons enumerated in the exceptions of the act, and who might receive free transportation, into three groups: (1) The "persons actively connected with the operation of railroads or with the administration in various capacities of their affairs;" (2) the "persons who are either engaged in administering charities or are the object of charitable aid", and (3) persons "who have to do with the affairs of persons, firms, or corporations, engaged in business along the line of railroads * * * and not in the employ of the railway com-

panies." To those classified in the first and second groups, it is held by them, free interstate transportation may be given without offending the provisions of the act, though the transportation is wholly for their personal pleasure and benefit; but to those classified in the third group, free interstate transportation cannot lawfully be given to or received by them "except in connection with the actual performance of duties, or on the return journey." Had this ruling been made as the result of some hearing or proceeding before the commission involving the question, we might be inclined, though not required, to accept such a construction, even though it was not in accord with our own views. However, since it was a mere response in reply to a letter seeking the views of the members of the commission, apparently not upon an actual
233 but a moot case, the ruling ought not be given the weight that otherwise should be given it had it been made under other circumstances. Notwithstanding the high regard entertained by us for the judgment of the members of the commission, we, nevertheless, are of the opinion that the construction placed by them on the Hepburn Act in this regard is not the correct one. Congress, of course, could except any persons it desired from the operation of the general provisions of the act forbidding the giving of free interstate transportation for passengers. It made such exceptions. It is generally recognized that an exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made. Tested by this principle, had the exception in respect of Railway Mail Service employés not been made, would the carriage of such employés on mail cars in the discharge of duties pertaining to the Railway Mail Service be in violation of the general provision of the act? We think not. It is generally held by the courts that "a mail agent or postal clerk employed and engaged in the service of the government and travelling in the postal or mail car, in charge of the mails, under a contract between the government and the carrier for the carriage of mail and the mail clerks having lawful custody thereof, is a passenger for hire to whom the carrier owes the same duty that it does to passengers riding upon the train, in so far as its liability for personal injuries arising from its negligence is concerned; the compensation for the carriage of such agents or clerks must be regarded as included in that paid by the government for the carriage of mails."
234 (Moore on Carriers, p. 577.) Such carriage, under such circumstances, in no sense would be free transportation, but transportation for hire, paid for by the government. We cannot believe it was thought by Congress that if the exception relating to Railway Mail Service employés was not made, the carriage of such persons in charge of the mails, in mail cars, or engaged in duties pertaining to the Railway Mail Service, under a contract between the government and the carrier for the carriage of mails and mail clerks, would, in any sense, be free transportation within the general words and in violation of the general provision of the act for-

bidding free interstate transportation. We think it manifest that something more and other than that was intended by such exception.

In the act is contained a number of exceptions. Some are without limitation or restriction; others are limited and restricted. Thus: "Necessary caretakers of livestock," etc.; "employés on sleeping cars;" "newsboys on trains;" and other exceptions specified in the act, have in themselves restrictive or qualifying terms. But in the exception "its (the carrier's) employés and their families, its officers, agents," etc., "ministers of religion," indigent persons, inmates of national or state homes, etc., are without terms of restriction or limitation. So is the exception as to "Railway Mail Service employés, postoffice inspectors, customs inspectors, and immigration inspectors." We see no more license to read into this exception words of restriction or limitation than into the first, second, third, or fourth exceptions specified in the act. Because such words are more easily read into this exception than into the
235 second, third, or fourth, is no reason why they should be read into it. They can as readily be read into the first as into this exception. That is, the words "when on duty" can as readily be read into the exception pertaining to the carrier's employés as in the exception pertaining to Railway Mail Service employés. The fact that the exception pertaining to "the employés on sleeping cars, express cars," is restricted and limited, and that the exception to "Railway Mail Service employés" is not restricted or limited, is, we think, significant, as bearing upon the intention that the former was intended to be restricted and the latter was not. If Congress intended the limitation or restriction to apply to both, such an intention could very easily have been expressed. We can see good reason why it was desired to restrict the one and not the other. We need not, however, speculate on that, for the intention to restrict the one and not the other, is, we think, made manifest by the language employed. Furthermore, exceptions in penal statutes ought to be liberally construed in favor of him who is charged with the violation of the provisions of the statute. We are therefore of the opinion that the Hepburn Act does not forbid a carrier from giving Railway Mail Service employés free interstate transportation when not on duty and when travelling for their own benefit or pleasure.

Though the construction which we have given the Hepburn Act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant. having undertaken and assumed to carry and transport the
236 deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground.

Moore, in his work on carriers, page 570, says:

"A person who travels upon a pass unlawfully issued to him in

violation of a law prohibiting the issuing of free passes is not a trespasser, but is entitled to the rights of a passenger."

The same principle is stated in 5 A. & E. Ency. Law, 2nd ed. p. 508. And to that effect are the following cases:

Bradburn v. Whatcom Co. Ry. & L. Co., 45 Wash. 583; 88 Pac. 1020.

Buffalo Etc. R. Co. v. O'Hara (Pa.) 9 A. & E. Rd. Cas. 317.

McNeill v. Durham & C. R. Co., 135 N. C. 682.

In the last named case numerous cases bearing on the subject are cited and reviewed. These cased proceed upon the theory and, as stated by the court in the case of Delaware, Lackawanna & Western R. Co. v. Trautwein, 52 N. J. L. 169, 7 L. R. A. 435, "that a railroad company having accepted a passenger, is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implication of law, independent of contract. To give the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal," and that the act of travelling on a pass forbidden by law is not the contributing cause of the injury. The principle involved in analogous to that applied whereby by the weight of authority, it has been held that a carrier, having accepted one as a passenger violating a statute prohibiting travel on Sunday, owes to him "the same duty as if he were lawfully travelling, and is responsible for a failure to perform it, the same in the one case as in the other," and that "the gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and fore-
237 sight can go, the person it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands." (Carroll v. Staten Island R. Co., 58 N. Y. 126.)

We are aware some courts have held that "the relation between carrier and passenger is contractual and is created only by contract, express or implied," (Farley v. Cincinnati H. & D. Co., 108 Fed. 14) upon which the conclusion may be based that if there is no valid contract of carriage, either express or implied, no relation of carrier and passenger is shown; and since the tort cannot be made to appear without proof of the illegal contract or transaction, on principle of public policy, a plaintiff, who requires aid from an illegal transaction or contract to establish his demand, must fail. Ordinarily the relation of carrier and passenger is created by contract, either express or implied. But the relation may exist independent of any contract between the parties themselves. We think this is clearly shown by Mr. Justice Douglas in the case of McNeill v. Durham & C. R. Co., supra. We think his conclusion is supported by the weight of authority that "the law imposes upon a com-

mon carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expres-
238 sion, and say that those duties and liabilities are imposed by law upon common carriers upon consideration of public policy independent of contract, and arise from the nature of their public employment." The same principle is stated by the Maryland court in State, use of Abell v. Western Maryland R. Co., 63 Md. 433 that "the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law," and that "a common carrier who accepts a party to be carried owes to that party a duty to be careful irrespective of contract."

Moore, in his work on carriers, page 568, says:

"Although it was for a long time urged on behalf of the carrier that it was liable only on its contract, and consequently that the law imposed no duty upon it in the case of a gratuitous undertaking to carry a passenger, there being no consideration, and, therefore, no legal contract, express or implied, the courts finally held otherwise, and it is now well settled that the carrier owes a duty to all upon its vehicle, independent of contract, even when the service is gratuitous, and that the breach of this duty is negligence for which it is liable to the same extent that it is liable to passengers who pay fare. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."

In Fetter on Carriers of Passengers, Sec. 220, it is said:

"It is now well settled that a carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage."

In Wharton's Law of Negligence, Secs. 355 354, it is said:

"But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the diligentia of the bonus et diligens pater-familias—in the performance of the service, even though there is no consideration for such undertaking. * * * The carrier is bound from the time he assents thus to carry such person, to exercise towards him the diligence, prudence and skill of a good carrier in that particular kind of transport."

239 The rule is stated by the English court, in Austin v. Great Western R. Co., L. R. 2 Q. B. 442, that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

It is unnecessary to further refer to the authorities or cases. We are of the opinion that when a common carrier accepts a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence, and skill, which, as carrying on a public employment, he owes to all his passengers; and that he cannot escape

liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous carriage permitted, by him, in violation of law. Though the gratuitous carriage of the deceased by the appellant should, under all the circumstances, be held to have been in violation of the Hepburn Act, in the commission of which both the deceased and the appellant were in pari delicto, and alike subject to the penalties of that act, yet that wrong in no sense influenced, nor was it a contributing cause of, the wrong or negligence of appellant resulting from its breach of duty imposed upon it by law and arising from the facts of its acceptance of the deceased as a passenger and its undertaking to carry him as such. Such duties were not dependent upon the particular kind of contract of carriage existing between itself and the deceased, but upon the facts that it had accepted him as a passenger, and as such undertook to convey him. And we say here, as was said in the case of Carroll v. Staten Island R. Co., supra, "This case, therefore, is not within the principle of many of the cases cited, which forbid
240 recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it. Mr. Justice Dixon, in the case of Sutton v. Town of Waunatosa, 29 Wis. 21, stated the proposition well when he said that "one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of," and that "himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail." For much stronger reasons should such principles be applied, when, as here, the defendant itself participated in the wrong charged against the deceased, the gratuitous carriage in violation of law. To permit the defense in such case is to allow the appellant to excuse itself or claim immunity from the consequences of its own tortious acts, negligently done to the deceased, on the ground that it and the deceased had been guilty of some other independent wrong, or violation of law, which in no sense influenced nor caused the tortious act of the appellant, and was not a contributing cause thereof, or of the injury, and bore no relation to
241 either of a cause to the effect produced by it. We do not mean to say, and do not hold, that if it were only lawful for the deceased to have travelled on his commission when he was in the discharge of his public duties, and unlawful for him to do so when he was not on duty, and if he, without the knowledge or consent of appellant or its agents in charge of the train, had made an unauthorized use of the commission by travelling thereon when he was not on

duty, that the relation of carrier and passenger would have been created rendering the appellant liable as in the case of a breach of duty in negligently transporting a passenger. A mere intruder or trespasser, of course, cannot create the relation of carrier and passenger by his own act. Nor can one create such relation by fraudulently or deceitfully making an unauthorized use of a commission, pass, ticket, or the like, nor by otherwise gaining his presence on the train by fraud or deceit, or through collusion or connivance with mere train crews. The test is, did the person desiring passage, in good faith, offer himself for the purpose of being carried as a passenger, and was he, as such, accepted and received by the carrier and undertaken to be transported by it? If so, then the relation of carrier and passenger arises, and the law casts the duty on the carrier to convey him safely, and to exercise toward him "the diligence, prudence, and skill of a good carrier in that particular kind of transport," regardless, or independent, of any contract existing between them. Now, while it was alleged in the answer that the deceased wrongfully and fraudulently, and with the intent, and for
242 the purpose of deceiving the appellant, and without its knowledge or consent, and against its will, entered and remained in the mail car, there is no evidence justifying a finding of any such facts. Upon the record the case is reduced to the simple facts where the deceased, with the full knowledge and consent of the appellant, was permitted to travel in the mail car on the commission issued to and held by him. The commission was "the evidence of his right of transportation." Upon that the deceased offered himself to be carried, and upon that the appellant accepted and received him, and undertook to transport him. There are, therefore, no facts nor inferences to support these averments contained in the answer, or to justify the submission of the case to the jury on such issues or theory. Upon the whole record we are persuaded that, on the question of appellant's liability, the respondents were entitled to recover as matter of law, and hence the errors referred to on the former hearing were nonprejudicial to the appellant. (Madsen v. Utah Light & Ry. Co. (Utah) 105 Pac. 799.)

Our former ruling reversing the judgment of the court below, and remanding the case for a new trial, is therefore set aside, and the judgment of the court below is now affirmed, with costs to respondents. It is so ordered.

We concur:

(Signed) J. E. FRICK, *J.*
(Signed) W. M. McCARTY, *J.*

243 In the Supreme Court of the State of Utah, Regular May Term, August 1, 1910.

MARY R. SCHUYLER, RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

In this cause it is ordered that the petition for a re-hearing heretofore filed herein be, and the same is hereby overruled.

244 In the Supreme Court of the State of Utah.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Foristall, Their Guardian ad Litem, Respondents,

v.

SOUTHERN PACIFIC COMPANY, Appellant.

(On Application for Rehearing.)

FRICK, *J.*:

The original opinion, as well as the one handed down on rehearing, is found in 109 Pac. 458-470. It will be seen by referring to the opinions there filed that in the second opinion we arrived at a result different from that arrived at in the first. In view of this appellant has filed a petition for a rehearing upon the second judgment in which it strenuously urges that the case should be remanded for a new trial. One of the points urged is, that the question of whether the conductor in charge of appellant's train had knowledge that the deceased was travelling on his commission when he was not on duty was one of fact which was not, but should be, submitted to a jury. If there had been any evidence in the case to justify a finding that appellant's agents in charge of the train had no knowledge that the deceased was travelling on his commission when he was not on duty, and further that they accepted him as a passenger and permitted him to ride in the mail car on the commission only in the belief that he was on duty and otherwise would not have accepted him as a passenger or yielded their assent to his riding
245 in the mail car on his commission and further, had we held under the provisions of the Hepburn act that it was not lawful for the deceased to ride on his commission when he was not on duty, then there might be much force to appellant's position. It, however, is clearly made to appear that the question of whether the deceased was on or off duty was not an element of, and did not enter into, the transaction. There is no evidence to justify a finding that had appellant's agents known that the deceased was not on duty such fact in any particular would have influenced their action in

permitting the deceased to ride in the mail car on his commission. There is nothing to show that the deceased deceived appellant's agents who were in charge of the train by pretending that he was or inducing them to believe that he was in the discharge of his duties, or that he deceived them or practiced any fraud on them in any other particular. Upon the whole record it is apparent, and as stated in our last opinion, that the deceased on his commission tendered himself as a passenger to be carried in appellant's mail car and upon that commission appellant's agents received and accepted him to be so carried regardless of the question whether he was on duty or not.

Moreover, we think that the stipulation referred to in the last opinion is also to that effect.

What appellant contended for in the court below was, that neither the appellant nor its agents could lawfully permit deceased to ride on the commission when he was not on duty. That was appellant's position in the court below all through the case. From such position, nor from the undisputed facts, nor from the unavoidable inferences to be deduced therefrom, can either we or a jury relieve the appellant. The rule announced in Wilkinson v. O. S. L. R. Co., 99 Pac., p. 471, by us applies here. We there said: "While
246 we have no disposition to pass upon the weight of the evidence, and disclaim any right to do so, we nevertheless may not ignore self-evident conclusions arising from undisputed facts." Under such circumstances, as in effect held in that case, a jury could at most excuse that which the law does not sanction. It seems palpable to us that in permitting the deceased to enter and ride upon appellant's train, whether he was there in one rather than another capacity, did not enter the minds of those who were in charge of it. If appellant, therefore, be now permitted to say that that question should enter into the consideration of the case it would be tantamount to permitting a fact to be shown in excuse of its legal liability which fact did not exist at the time of the transaction, and hence in legal effect would amount to permitting the case to be ruled or controlled by an immaterial issue. No one will seriously dispute that whether a certain fact is material or immaterial in view of all the circumstances and the other facts found or admitted in the case is purely a question of law. In any view, therefore, the conclusion reached in the last opinion handed down, and which is now assailed, is right and should prevail.

Counsel, however, likewise insist that because we held in the last opinion that the deceased did not come within the Hepburn Act, therefore a federal question was involved; that this question now arises for the first time by reason of the fact that we have held that under the allegations of the complaint the respondents can recover upon the theory that the deceased was on the train as a gratuitous passenger. We considered the case from several view points. In one of them we undoubtedly construed and gave effect to a federal statute. However, from another view point the final result reached by us in the case was wholly independent of the fed-

eral statute. Cases sometimes arise in which state courts
247 during the course of the trial or proceeding, are required to deny certain rights claimed under a federal statute. When such a condition arises a case, under peculiar circumstances, may be taken on a writ of error from a state court of last resort to the Supreme Court of the United States. Mr. Chief Justice Straup, in the first opinion, clearly and correctly stated under what circumstances and conditions a case may be removed from a state to a federal court for trial. We repeat here that unless it be made to appear from the initial pleading filed by the plaintiff in an action that the case is one that may be removed to a federal court it cannot be removed notwithstanding that during the course of the trial or proceeding a federal question may arise for which a removal might have been had if it had appeared from the initial pleading and timely application for removal had been made. Moon on the Removal of Causes, sec. 101.

Nor is counsel's claim permissible that a federal question is now presented upon the face of the complaint because of the construction we gave to some of the allegations therein contained. What was said in that regard simply amounted to this: That under the allegations of the complaint it did not constitute a material, hence not a fatal, variance under our statute, for respondent to prove that the deceased was a gratuitous passenger on appellant's train at the time of and preceding the accident. That such a ruling could change the complaint from one upon the face of which no removable question was presented to one where such a question was apparent is inconceivable to us.

We have given this case most thorough and painstaking attention. We are thoroughly convinced that the conclusions reached in the last opinion, in view of the undisputed facts, is in harmony with law, reason and justice.

248 No reasons being shown in the last application for a rehearing why that judgment should not stand the application for a rehearing is denied.

We concur:

D. N. STRAUP, *C. J.*
W. M. McCARTY, *J.*

249 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Petition for Writ of Error.

To the Honorable D. N. Straup, Chief Justice of the Supreme Court of the State of Utah:

Comes now the above named Southern Pacific Company, a corporation, and says: That in due time after the filing of the complaint herein it filed, in proper form, a bond and petition asking that this cause be removed to the United States Circuit Court in and for the District of Utah, which petition for removal was denied; that thereafter on the trial of this cause a jury returned a verdict in favor of defendants in error and against plaintiff in error in the sum of $9000.00; that thereafter motion for a new trial being denied judgment was, on December 17th, 1908, entered on said verdict for $9000.00, together with costs amounting to $46.05; that in due time your petitioner appealed to the Supreme Court of the State of Utah from said judgment and said court on the 28th day of August, 1909, reversed said judgment and ordered a new trial; that thereafter on rehearing said court, on June 2nd, 1910, set aside its first opinion and affirmed the judgment; that thereafter your petitioner filed a petition for rehearing, which was duly considered and, on the 1st day of August, 1910, denied by this court, whereupon said judgment became final, this court being the highest court in this state in which a decision could be had in this case; that said Southern Pacific Company, a corporation, was and is aggrieved in that,
250 in said judgment and the proceedings had prior thereto in this case, certain errors were committed to its prejudice.

That the complaint of defendants in error in said case was a petition for the recovery of damages by reason of the death of Charles Albert Schuyler, husband of Mary R. Schuyler, and father of said infants, said damages being laid in the sum of $50,000.00, and said death being alleged to have been caused by the negligence *an* and carelessness of plaintiff in error, its agents and servants, in the operation of east bound passenger train No. 10 on defendant's lines of railroad between the city of Oakland, in the state of California, and the city of Ogden, in the state of Utah. The plaintiff in error in said cause is a corporation as aforesaid, having its principal office and place of business within the state of Utah at the city of Ogden, and it was, at the time of the commencement of this suit and still is, a resident and a citizen of the state of Kentucky; that defendants in error in said cause (excepting J. M. Forristall, guardian ad litem) are, and each thereof was at the time of the commencement of this suit, and they still are, citizens and residents of the county of Ala-

meda, state of California; that said J. M. Forristall, guardian ad litem, was and is a resident of the state of Utah. That about the 14th day of January, 1907, the aforesaid Charles Albert Schuyler as an employé of the United States government in its railway mail service, while riding in one of the mail cars on one of your petitioner's trains, to wit, train No. 10, as aforesaid, then being operated over said line of railroad between said points as aforesaid, received injuries from which he thereafter died. That at the time he was thus injured said Schuyler was travelling for his own convenience wholly unconnected with any official duty and used as evidence of his right to ride thereon his official mail clerk's commission, which, petitioner avers, was issued to and held by him to be used only when engaged wholly in the Government service and when on duty in said service and not otherwise. That your petitioner herein claimed and still claims that under section 1, par. 4 of the Hepburn Act (34 St. L. p. 584, Fed. Stat. Am. Supp. 1907, p. 169) free interstate
251 transportation for mail clerks in such cases as the one at issue is forbidden. That upon the trial of said cause in the nisi prius court and on appeal your said petitioner contended and still contends that the deceased accordingly acquired no rights as a gratuitous passenger by virtue of his commission as such mail clerk or otherwise or at all. That the suit herein is of a civil nature at law, arising under the constitution and laws of the United States, Section VIII of Article I, declaring that Congress shall have power to "establish postoffices and post roads;" also "to regulate commerce with foreign nations and among the several States." Also, under the Act of Congress of the United States, approved June 13th, 1898, and June 9th, 1896, and Acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and other officers of the postoffice department of the Government of the United States; also the Act of March 3rd, 1887, pertaining to messenger service in connection with railroads, etc.; also Act of Congress of the United States, approved February 4th, 1887, and Acts amendatory thereof, including the Act approved June 29th, 1906. That by this action there was drawn in question the construction of certain of said statutes, to wit, said Hepburn Act; that the matter decided as developed in the whole record was: (1) that the Hepburn Act does not prohibit giving "free" transportation to mail clerks for an interstate trip when off duty, and (2) that a conductor can give "consent" to a mail clerk riding free when off duty so as to constitute him a "gratuitous" passenger on an interstate journey. That the decision of this court is against the right claimed by the said Southern Pacific Company, a corporation, plaintiff in error, under such statutes and as it believes, contrary to the statutes of the United States relating to interstate transportation and against the right of said Southern Pacific Company, a corporation, therein, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said Southern Pacific Company, a corporation, prays that a writ of error may issue to the Supreme Court of the State of Utah, for the correcting of the errors complained of, and that a duly

authenticated transcript of the record, proceedings and papers
252 herein may be sent to the United States Supreme Court.
Salt Lake City, Utah, August 4th, A. D. 1910.

SOUTHERN PACIFIC COMPANY,
A CORPORATION,
By PARLEY L. WILLIAMS,
Its General Attorney.

PARLEY L. WILLIAMS,
GEORGE H. SMITH,
ARTHUR W. NORTH,
Attorneys for said Southern Pacific Company.

253 [Endorsed:] Supreme Court of Utah. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Mary R. Schuyler, et al., Defendants in Error. Petition for Writ of Error. Filed August 5th, 1910. H. W. Griffith, *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

254 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Assignment of Errors and Prayer on Writ of Error from Supreme Court of the United States to the Supreme Court of Utah.

Comes now the above named plaintiff in error and files herewith its petition for a writ of error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Utah in the above entitled cause there is manifest error to the plaintiff in error herein, to its prejudice and against its rights; and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of error, to wit:

First. The Supreme Court of the State of Utah erred in failing and refusing to direct the nisi prius court to grant the petition for removal by plaintiff in error asking the removal of this cause from the State Court to the United States Circuit Court for the eighth circuit in and for the District of Utah, on the ground that the decision of the case necessarily involved a federal question, to which judgment and decision this plaintiff in error took and preserved proper exception, and to which judgment and decision plaintiff in error hereby excepts and assigns the same as error.

Second. The plaintiff in error avers that the judgment of said Supreme Court of the State of Utah aforesaid is repugnant to
255 and in conflict with Article 1, Section 8, of the Constitution of the United States, which declares that Congress shall have

power to "establish postoffices and post roads," and "to regulate commerce with foreign nations and among the several states."

Third. Plaintiff in error further says that the judgment of said Supreme Court of the State of Utah aforesaid is repugnant to and in conflict with the act of the Congress of the United States approved June 13, 1898, and June 9, 1896, and the acts amendatory thereof and supplementary thereto relating to the transportation of railway mail clerks and other officers of the postoffice department of the government of the United States, and also the act of March 3, 1887, pertaining to messenger service in connection with railroads, etc., and also to the act of Congress of the United States approved February 4, 1887, and acts amendatory thereof, including the act approved June 29, 1906, and to paragraph 4, section 1, of the Hepburn Act (34 St. L. p. 584, Fed. Stat. Ann. Supp., 1907. p. 169).

The Supreme Court of the State of Utah, which is the highest court of said state in which a decision in this suit could be had, where was drawn in question the construction of the aforesaid Acts, rendered judgment against the rights specially set up and claimed by the plaintiff in error herein under said Constitution and Acts of Congress.

Fourth. The Supreme Court of the State of Utah erred in holding and deciding that the Hepburn Act, above referred to, does not prohibit a United States railway mail clerk from using free transportation on an interstate trip when off duty.

Fifth. The Supreme Court of the State of Utah erred in holding and deciding that the Hepburn Act, above referred to, does not prohibit giving free transportation to mail clerks for an interstate trip when off duty.

Sixth. The Supreme Court of the State of Utah erred in holding and deciding that a railway train conductor, or any member of a train crew, can give consent to a mail clerk riding free when
256 off duty so as to bind the railroad company or constitute him a gratuitous passenger on an interstate journey.

Seventh. The Supreme Court of the State of Utah erred in holding and deciding that plaintiff in error, its conductor or other employés, did in fact consent to decedent's riding free on an interstate trip when off duty.

Eighth. The evidence showing, and the court deciding, that deceased was not on duty as a mail clerk when killed, the Supreme Court of the State of Utah erred in holding and deciding that judgment could be recovered on the theory—not submitted to the jury—that he was a gratuitous passenger on an interstate trip riding with the consent of the company and its employés, when in the complaint filed it was charged and alleged that he was riding as a mail clerk in the performance of his duties under an arrangement between the government and the railroad company for the transportation of the mails and mail clerks in charge thereof.

Ninth. That the Supreme Court of the State of Utah erred in rendering judgment against plaintiff in error in said cause in view

of the pleadings in said cause, and that said judgment is contrary to law and the facts in said cause.

Tenth. The Supreme Court of the State of Utah erred in failing and refusing to set aside the verdict rendered in the nisi prius court, said verdict having been returned upon a fatally defective instruction (No. 2) wherein the trial court directed the jury that they were to indulge the presumption that deceased was rightfully on the train at the time of the accident and that the burden was on the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, and by evidence strong enough to produce conviction. Said instruction being as follows:

"It is undisputed that the deceased, Charles Albert Schuyler, was at and prior to the time of his injury and death an employé of the railway mail service of the United States and that at the time of his injury and death he was in one of the railway mail cars on the defendant's line of road, and I charge you the presumption is that he was there lawfully and rightfully, in the discharge of his official duties as such employé, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, but the Court charges you that such presumption would be overcome if by affirmative proof and by a preponderance of the evidence you are convinced that the said Charles Albert Schuyler, at the time of his injury and death on one of the railway mail cars of the defendant's line of road, was not there in the discharge of his official duties as an employé of the railway mail service, but that while traveling on the defendant's railroad train at said time and place he was traveling solely for his own purposes, unconnected with any official duty."

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Eleventh. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 1, as follows:

"Gentlemen of the jury, the Court instructs you that the plaintiffs are not entitled to recover in this case, and your verdict, therefore, will be for the defendant. (Refused)."

Twelfth. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 2, as follows:

"You are instructed that the Act of Congress as amended June 29, approved June 30, 1906, commonly called the Hepburn Act, among other things provides:

'No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State

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Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employés, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars; and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' (Refused)."

Thirteenth. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 3, as follows:

"You are therefore instructed that if you find from the testimony in this case that Charles Albert Schuyler, at the time of the accident in which he received the injuries from which he thereafter
259 died, had made the journey from Ogden to San Francisco to attend the funeral of his child, or on any other personal business of the said decedent's, and while returning therefrom received the injuries in question from which he thereafter died, then the plaintiffs, and each thereof, would be precluded from recovering in this case, and your verdict should be for the defendant. (Refused.)"

Fourteenth. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction No. 4, as follows:

"The Court instructs you that the commission issued by the Government to said Charles Albert Schuyler, and upon which he was riding at the time of the accident complained of, was a request on the defendant company made by the Government to transport said Schuyler only when he was engaged wholly in the performance of his official duties, and not otherwise. (Refused.)"

Fifteenth. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction No. 5, as follows:

"You are instructed that neither the conductor of the train nor any of the officers or agents of the railroad company could authorize or permit the said Charles Albert Schuyler to ride on its trains, when not on duty, without paying the regular and full fare charged in its tariffs for like transportation of other persons." (Refused.)"

Sixteenth. That said Court erred in denying the motion of plain-

tiff in error made after defendants in error rested their case, that the Court direct the jury to return a verdict for plaintiff in error.

Wherefore, for these and other manifest errors appearing in the record, the said Southern Pacific Company, a corporation,
260 prays that the judgment aforesaid may be reversed and altogether held for naught and that it may be restored to all things which it has lost by the action and because of the said judgment, and further may have such other and further relief as may be proper and just; and for costs.

Dated this 5th day of August, A. D. 1910.

PARLEY L. WILLIAMS,
GEORGE H. SMITH,
ARTHUR W. NORTH,
Attorneys for Southern Pacific Company, Plaintiff in Error.

261 [Endorsed:] Supreme Court of Utah. Southern Pacific Company, a corporation, Plaintiff in Error, vs. Mary R. Schuyler, et al., Defendants in Error. Assignment of Errors. Filed August 5th, 1910. H. W. Griffith *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

262 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
v.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, That we, the Southern Pacific Company, a corporation, as principal, and L. S. Hills, of the county of Salt Lake, State of Utah, and W. W. Riter, of the same county and state, as sureties, are held and firmly bound unto the above named Mary R. Schuyler, and Rhea Schuyler, Edward Schuyler, Vera Schuyler, and Dorothy Schuyler, infants, by John M. Forristall, their guardian ad litem, in the sum of twenty-five thousand dollars ($25,000.00) to be paid to them, their executors, administrators, or assigns, and for payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 5th day of August, in the year of our Lord one thousand nine hundred and ten.

Whereas the above named Southern Pacific Company, a
263 corporation, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse

the judgment rendered in the above entitled action by the supreme court of the State of Utah.

Now, therefore, the condition of this obligation is such that if the said Southern Pacific Company shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void otherwise to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY,
A Corporation,
By PARLEY L. WILLIAMS, [SEAL.]
Its General Attorney.

L. S. HILLS.
W. W. RITER.

STATE OF UTAH,
County of Salt Lake, ss:

L. S. Hills and W. W. Riter, whose names are subscribed to the above bond, being severally and duly sworn, each for himself says, that he is a resident and freeholder of the State of Utah, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in this State.

L. S. HILLS.
W. W. RITER.

Subscribed and sworn to before me, this 5th day of August, A. D. 1910.

My commission expires January 1, 1911.

[SEAL.] L. B. SWANER,
Notary Public.

This bond approved this 5th day of August, A. D. 1910.

D. N. STRAUP,
Chief Justice of the Supreme Court of Utah.

Endorsed: Bond Filed August 5th, 1910. H. W. Griffith, Clerk, Supreme Court, Utah.

264 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Allowance of Writ.

Comes now the Southern Pacific Company, a corporation, the plaintiff above named on this 3rd day of August, A. D. 1910, and files and presents to this court, its petition, praying for the allow-

ance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said Southern Pacific Company, a corporation, appellant, give bond according to law in the sum of Twenty five thousand ($25,000.00) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 5th day of August, A. D. 1910.

D. N. STRAUP,
Chief Justice of the Supreme Court of the State of Utah.

265 [Endorsed:] Supreme Court of Utah. Southern Pacific Company, a corporation, Plaintiff in Error, vs. Mary R. Schuyler et al., Defendants in Error. Allowance of Writ. Filed August 5th, 1910. H. W. Griffith, *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

266 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Utah, before you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Mary R. Schuyler, and Rhea Schuyler, Edward Schuyler, Vera Schuyler, and Dorothy Schuyler, infants, by John M. Forristall, their guardian ad litem, and the Southern Pacific Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was

drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was
267 drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Southern Pacific Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washingon, within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United Staes, should be done.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this 5th day of August, in the year of our Lord, one thousand nine hundred and ten.

Done in the city and county of Salt Lake, with the seal of the circuit court of the United States for the district of Utah attached.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the Circuit Court of the United States, District of Utah,
By MARGARET B. CONNELL,
Deputy Clerk.

Allowed by
D. N. STRAUP,
Chief Justice of the Supreme Court of the State of Utah.

268 [Endorsed:] Supreme Court of Utah. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Mary R. Schuyler, et al., Defendants in Error. Writ of Error. Filed August 5th, 1910. H. W. Griffith, *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

269 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,

vs.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mary R. Schuyler and Rhea Schuyler, Edward Schuyler, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Utah, wherein the Southern Pacific Company, a corporation, designated as such is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the supreme court of the State of Utah, this 5th day of August, 1910.

D. N. STRAUP,
Chief Justice of the Supreme Court of the State of Utah.

Attest:

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

H. W. GRIFFITH,
Clerk of the Supreme Court of the State of Utah.

270 [Endorsed:] Supreme Court of Utah. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Mary R. Schuyler et al., Defendants in Error. Citation. Filed August 5, 1910. H. W. Griffith, *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

271 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Certificate of Lodgment.

SUPREME COURT,
State of Utah, ss:

I, H. W. Griffith, clerk of the said court, do hereby certify that there was lodged with me as such clerk on August 5th, 1910, in the above entitled cause:

I. The original bond of which a copy is herein set forth.

II. Copies of the documents enumerated below, to file in my office.

III. Copy of an admission of service showing that copies of the same documents had been served on defendant in error Mary R. Schuyler, and John M. Forristall, guardian ad litem of the infant defendants in error:

1. Petition for writ of error.
2. Assignment of errors, and prayer.
3. Bond on writ of error.
4. Allowance of writ of error.
5. Writ of error.
6. Citation.
7. Certificate of lodgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salt Lake City, Utah, this 8th day of August, 1910.

H. W. GRIFFITH,
Clerk, Supreme Court of Utah.

272 [Endorsed:] 2034. Supreme Court of Utah. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Mary R. Schuyler et al., Defendants in Error. Certificate of Lodgment. Filed August 8th, 1910. H. W. Griffith, *H. W. Griffith,* Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

273 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Admission of Service.

Service of true copies of the following documents is hereby admitted for defendants in error:

1. Petition for writ of error.
2. Assignment of Errors, and prayer.
3. Bond on writ of Error.
4. Allowance of Writ of Error.
5. Writ of Error.
6. Citation.
7. Certificate of Lodgment.

The service being made at Ogden City Utah this, the 8th day of August, 1910.

AGEE AND McCRACKEN,
BERT SCHLESINGER,
Attorneys for Defendants in Error.

274 [Endorsed:] 2034. Supreme Court of Utah. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Mary R. Schuyler et al., Defendants in Error. Admission of service of all Documents. Filed August 8, 1910. H. W. Griffith, *H. W. Griffith*, Clerk, Supreme Court, Utah. Parley L. Williams, George H. Smith, Arthur W. North, Attorneys for Plaintiff in Error.

275 United States of America.

STATE OF UTAH,
County of Salt Lake, ss:

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, do hereby certify that pursuant to a Writ of Error directed to said Supreme Court of Utah, wherein the Southern Pacific Company is Plaintiff in Error, and Mary R. Schuyler, et al., are Defendants in Error, I herewith return attached hereto a transcript of the record and proceedings on appeal to said supreme court, together with a copy of the assignment of errors filed in said court, submission of said cause, judgment rendered and opinion filed August 27, 1909, order of Nov. 5, 1909, granting a rehearing of said cause, copy of the judgment and opinion filed on said rehearing June 2, 1910, and a copy of the order denying the petition for rehearing of said cause, of the Southern Pacific Company, and the opinion filed thereon August 1, 1910.

Also the original Petition for a Writ of Error, allowance of said Writ, Writ of Error, Assignment of Errors and Prayer on said Writ of Error, the Citation served on Defendants in Error, and a copy of the Bond filed pursuant to the allowance of said writ of error; together with the certificate of lodgment and admission of service of the above papers by counsel for defendant in error.

And I further certify that said transcript of the record filed and proceedings had in said Supreme Court of Utah, are full, true and correct copies of the originals now of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, this the 27th day of September, A. D. 1910.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

H. W. GRIFFITH, *Clerk.*

276 In the Supreme Court of the State of Utah.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,

vs.

MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, Vera Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Assignment of Errors and Prayer on Writ of Error from Supreme Court of the United States to the Supreme Court of Utah.

Comes now the above named plaintiff in error and files herewith its petition for a writ of error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Utah in the above entitled cause there is manifest error to the plaintiff in error herein, to its prejudice and against its rights; and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of error, to wit:

First, the Supreme Court of the State of Utah erred in failing and refusing to direct the nisi prius court to grant the petition for removal filed by plaintiff in error asking the removal of this cause from the State Court to the United States Circuit Court for the eighth circuit in and for the District of Utah, on the ground that the decision of the case necessarily involved a federal question, to which judgment and decision this plaintiff in error took and preserved proper exception, and to which judgment and decision plaintiff in error hereby excepts and assigns the same as error.

Second, the plaintiff in error avers that the judgment of said Supreme Court of the State of Utah aforesaid is repugnant to
277 and in conflict with Article 1, Section 8, of the Constitution of the United States, which declares that Congress shall have power to "establish postoffices and post roads," and "to regulate commerce with foreign nations and among the several states."

Third, plaintiff in error further says that the judgment of said Supreme Court of the State of Utah aforesaid is repugnant to and in conflict with the act- of the Congress of the United States approved June 13, 1898, and June 9, 1896, and the acts amendatory thereof and supplementary thereto relating to the transportation of railway mail clerks and other officers of the postoffice department of the government of the United States, and also the act of March 3, 1887, pertaining to messenger service in connection with railroads, etc., and also to the act of Congress of the United States approved February 4, 1887, and acts amendatory thereof, including the act approved June 28, 1906, and to paragraph 4, section 1, of the Hepburn Act (34 St. L., p. 584, Fed. Stat. Ann. Supp., 1907, p. 169).

The Supreme Court of the State of Utah, which is the highest court of said state in which a decision in this suit could be had, where was drawn in question the construction of the aforesaid acts, rendered judgment against the rights specially set up and claimed by the plaintiff in error herein under said Constitution and Acts of Congress.

Fourth, the Supreme Court of the State of Utah erred in holding and deciding that the Hepburn Act, above referred to, does not prohibit a United States railway mail clerk from using free transportation on an interstate trip when off duty.

Fifth, the Supreme Court of the State of Utah erred in holding and deciding that the Hepburn Act, above referred to, does not prohibit giving free transportation to mail clerks for an interstate trip when off duty.

Sixth, the Supreme Court of the State of Utah erred in holding and deciding that a railway train conductor, or any member of a train crew, can give consent to a mail clerk riding free when
278 off duty so as to bind the railroad company or constitute him a gratuitous passenger on an interstate journey.

Seventh, the Supreme Court of the State of Utah erred in holding and deciding that plaintiff in error, its conductor or other employés, did in fact consent to decedent's riding free on an interstate trip when off duty.

Eighth, The evidence showing, and the court deciding, that deceased was not on duty as a mail clerk when killed, the Supreme Court of the State of Utah erred in holding and deciding that judgment could be recovered on the theory—not submitted to the jury—that he was a gratuitous passenger on an interstate trip riding with the consent of the company and its employés, when in the complaint filed it was charged and alleged that he was riding as a mail clerk in the performance of his duties under an arrangement between the government and the railroad company for the transportation of the mails and mail clerks in charge thereof.

Ninth, That the Supreme Court of the State of Utah erred in rendering judgment against plaintiff in error in said cause in view of the pleadings in said cause, and that said judgment is contrary to law and the facts in said cause.

Tenth, The Supreme Court of the State of Utah erred in failing

and refusing to set aside the verdict rendered in the nisi prius court, said verdict having been returned upon a fatally defective instruction (No. 2) wherein the trial court directed the jury that they were to indulge the presumption that deceased was rightfully on the train at the time of the accident and that the burden was on the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, and by evidence strong enough to produce conviction. Said instruction being as follows:

"It is undisputed that the deceased, Charles Albert Schuyler, was at and prior to the time of his injury and death an employé of the railway mail service of the United States and that at the time of his injury and death he was in one of the railway mail cars on the defendant's line of road, and I charge you the presumption is
279 that he was there lawfully and rightfully, in the discharge of his official duties as such employé, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, but the Court charges you that such presumption would be overcome if by affirmative proof and by a preponderance of the evidence you are convinced that the said Charles Albert Schuyler, at the time of his injury and death on one of the railway mail cars of the defendant's line of road, was not there in the discharge of his official duties as an employé of the railway mail service, but that while traveling on the defendant's railroad train at said time and place he was traveling solely for his own purposes, unconnected with any official duty."

Eleventh. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 1, as follows:

"Gentlemen of the jury, the Court instructs you that the plaintiffs are not entitled to recover in this case, and your verdict, therefore, will be for the defendant. (Refused.)"

Twelfth. The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 2, as follows:

"You are instructed that the Act of Congress as amended June 29, approved June 30, 1906, commonly called the Hepburn Act, among other things provides:

'No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable
280 and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care-

takers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employés, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars; and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' (Refused.)"

Thirteenth, The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction numbered 3, as follows:

"You are therefore instructed that if you find from the testimony in this case that Charles Albert Schuyler, at the time of the accident in which he received the injuries from which he thereafter
281 died, had made the journey from Ogden to San Francisco to attend the funeral of his child, or on any other personal business of the said decedent's and while returning therefrom received the injuries in question from which he thereafter died, then the plaintiffs, and each thereof, would be precluded from recovering in this case, and your verdict should be for the defendant. (Refused.)"

Fourteenth, The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction No. 4, as follows:

"The Court instructs you that the commission issued by the Government to said Charles Albert Schuyler, and upon which he was riding at the time of the accident complained of, was a request on the defendant company made by the Government to transport said Schuyler only when he was engaged wholly in the performance of his official duties, and not otherwise.

(Refused.)"

Fifteenth, The trial court erred in refusing to instruct the jury as requested in plaintiff in error's instruction No. 5, as follows:

"You are instructed that neither the conductor of the train nor any of the officers or agents of the railroad company could authorize or permit the said Charles Albert Schuyler to ride on its trains, when not on duty, without paying the regular and full fare charged in its tariffs for like transportation of other persons."

(Refused.)"

Sixteenth, That said Court erred in denying the motion of plaintiff in error made after defendants in error rested their case, that the Court direct the jury to return a verdict for plaintiff in error.

Wherefore, for these and other manifest errors appearing in the record, the said Southern Pacific Company, a corporation,
282 prays that the judgment aforesaid may be reversed and altogether held for naught and that it may be restored to all things which it has lost by the action and because of the said judgment, and further may have such other and further relief as may be proper and just; and for costs.

PARLEY L. WILLIAMS,
GEORGE H. SMITH,
ARTHUR W. NORTH,
Attorneys for Southern Pacific Company, Plaintiff in Error.

283 Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

Printing of Record.

To James H. McKenney, Esq., Clerk of U. S. Supreme Court, and to the above-entitled defendants in error and Messrs. Agee & McCracken and Bert Schlesinger, their counsel:

You and each of you will please take notice that, in accordance with Sec. 9 of Rule 10 of the above entitled Court, plaintiff in Error *attached* herewith presents a copy of the Assignment of Errors on which it intends to rely, and requests and directs the above named clerk of said Court to print the record in this cause as contained in the duly authenticated transcript as prepared, and filed in this Court, by the clerk of the Supreme Court of the State of Utah, excepting and omitting the following designated parts thereof:

1. Omit the Second Cause of Action of the Complaint, beginning with said words on page 6 and ending with paragraph 4 on page 8 of the Transcript, said cause of action having been dismissed at the trial.

2. Omit the Affidavit in Support of Motion for New Trial, found on pages 58, 59, 60, 61, 62 of said Transcript.

PARLEY L. WILLIAMS,
GEORGE H. SMITH,
ARTHUR W. NORTH,
Attorneys for Southern Pacific Co., Plaintiff in Error.

Copies of foregoing and attached mailed to counsel for defendants in error this 28th day of September, 1910.

284 [Endorsed:] File No. 22,337. Supreme Court U. S. October Term, 1910. Term No. 716. Southern Pacific Co., Pl'ff in Error, vs. Mary R. Schuyler et al. Assignment of errors and designation by plaintiff in error of parts of record to be printed. Filed October 4, 1910.

285 Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY R. SCHUYLER and RHEA SCHUYLER, EDWARD SCHUYLER, VERA Schuyler, and Dorothy Schuyler, Infants, by John M. Forristall, Their Guardian ad Litem, Defendants in Error.

STATE OF UTAH,
County of Salt Lake, ss:

E. M. Bagley, being first duly sworn, deposes and says:

1. I am, and at the several times hereinafter mentioned was a citizen of the United States over the age of twenty-one years, and was one of the attorneys of record in this cause in the district court and state Supreme Court of Utah.

2. That on the twenty-eighth (28th) day of September, 1910, copies of the plaintiff in error's designation for the printing of the record in this cause in this court, together with copies of the assignment of errors designating the errors on which plaintiff in error will rely for reversal, were by me deposited in the post office, and directed to counsel for defendants in error at their respective places of residence, to wit: One addressed to Mr. Bert Schlesinger, Mutual Savings Bank Building, San Francisco, California; and another copy addressed to Messrs. Agee & McCracken, Attorneys, Ogden, Utah; the places of residence so designated being known to me to be the addresses of said counsel; and I prepaid the postage thereon.

E. M. BAGLEY.

Subscribed and sworn to before me this 12th day of October, 1910.

[Seal L. B. Swaner, Notary Public, Salt Lake County, Utah. Commission Expires Jan. 1, 1911.]

L. B. SWANER,
Notary Public.

286 [Endorsed:] File No. 22,337. Supreme Court U. S. October Term, 1910. Term No. 716. Southern Pacific Company, Pl'ff in Error, vs. Mary S. Schuyler et al. Affidavit as to service of copies of designation by plaintiff in error of parts of record to be printed and assignment of errors. Filed October 17, 1910.

Endorsed on cover: File No. 22,337. Utah Supreme Court. Term No. 143. Southern Pacific Company, plaintiff in error, vs. Mary R. Schuyler and Rhea Schuyler, Edward Schuyler, Vera Schuyler, and Dorothy Schuyler, infants, by John M. Forristall, their guardian ad litem. Filed October 4th, 1910. File No. 22,337.

2

Office Supreme Court, U. S.
FILED.
DEC 9 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 143.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

MARY R. SCHUYLER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
P. L. WILLIAMS,
E. M. BAGLEY,
Of Counsel for Plaintiff in Error.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 143.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

MARY R. SCHUYLER ET AL.

In Error to the Supreme Court of the State of Utah.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This Court is asked to review a judgment obtained in the State Court of Utah for damages on account of the death of Charles Albert Schuyler, an assistant chief clerk in the United States Railway Mail Service, who, it is claimed by plaintiff in error, was killed in the derailment of its fast mail train at Gartney, Utah, January 14,

1907, while unlawfully and clandestinely endeavoring, *when off duty* and while traveling on a *personal* mission, to ride *free* by using his *official* commission on an *interstate* trip, between Oakland, California, and Ogden, Utah, in violation of the terms of the Hepburn Act (34 U. S. Stat., 584).

The jury returned a verdict in favor of the heirs. On appeal the case was first reversed, but later, on rehearing, the judgment was affirmed by the State Supreme Court, which held that the Hepburn Act did "not forbid a carrier from giving Railway Mail Service employees free interstate transportation when not on duty and when traveling for their own benefit or pleasure" (Tr. p. 137), notwithstanding the fact that the Interstate Commerce Commission had held to the contrary.

Pleadings.

Epitomized, the gravamen of the complaint is that plaintiff in error operated trains for the transportation of passengers for hire, and carried the mail under arrangements between it and the government, and that "for the carrying of such mails and the *employes and mail*

clerks engaged in the supervision, handling and care of such mails while being *so* transported" plaintiff in error received compensation from the government (Tr. 2); that Schuyler was in the employ of the government as a clerk in the Railway Mail Service; that in the discharge of his duties as such employe *it was necessary* for him to ride on trains of plaintiff in error and in mail cars of such trains between the city of San Francisco, California, and Ogden, Utah; that at the time of the accident, deceased, while so in the employ of the United States Government as such clerk, was *necessarily* in a certain mail car attached to train No. 10 and was being transported by the said plaintiff in error *as such clerk* on said train; and that plaintiff in error had undertaken for a consideration, and under arrangements between it and the government, to safely transport deceased "as such employe and clerk" from San Francisco to Ogden; "but while said deceased was in said car with the knowledge and consent of the said defendant, its agents and servants, *as such clerk, and in the discharge of his duties as such*" the train was derailed and he was killed (Tr. 3).

In its answer plaintiff in error admitted that

Schuyler was in the employ of the government; but *denied that while in such employ and on duty his duties required him to ride on the trains of plaintiff in error or on the mail cars thereof;* it denied that on the 14th day of January, 1907, Schuyler was riding in the mail car either as in the complaint set forth, or at all while on duty, or while in the performance of his official duty; to the contrary, it averred that Schuyler was not on duty, had not been on duty that day; and that he then was, *without the consent* of this plaintiff in error, and *without the payment of any fare*, riding and traveling on the said train *for his own purposes* u[illegible]connected with official or any duty; it denied that Schuyler was on the train or in the mail car by any right or permission of plaintiff in error, or by any right whatever; it denied that he was engaged in the performance of his or any duties as such or any mail clerk, or any duty whatever; it admitted that the mail car was derailed; but denied that Schuyler was killed without fault on his part and averred the contrary—that he was on the train by his own fault and without authority or permission (Tr. 13).

As its further and separate answer plaintiff in error specifically averred that Schuyler was em-

ployed by the government *as assistant chief clerk* of the Railway Mail Service, *assigned for duty at Ogden;* that in order to enable him to perform the duties pertaining to his assignment he was permitted *when wholly engaged in said service of said employer*, and not otherwise, to be in and upon certain mail cars of plaintiff in error used by it in transporting the United States mail; that contrary to said right, and in violation of the agreement between said government and the plaintiff in error, and *against its will* and *without the consent* and without the knowledge of said government, or of this plaintiff in error, *and in violation of the statutes of the United States pertaining thereto*, and with the intent and for the purpose of *deceiving* said government and this plaintiff in error; and for the purpose of avoiding the payment of fare, Schuyler wrongfully entered into and remained upon the train and cars of plaintiff in error, and did fraudulently and in violation of said statutes and against plaintiff in error's will; and without its knowledge and consent, *and against the public policy of the State of Utah and the United States of America*, secure his transportation within said car as described in the complaint, from the city of Ogden, Utah, to Oakland, California, and re-

turn from said Oakland to the point of the accident. And that in consequence of his said journey, fraudulent as aforesaid, and while violating the agreement between said government and this plaintiff in error; and in violation of the statutes of the United States pertaining thereto, and while wrongfully on said train and cars as aforesaid, and not otherwise, Schuyler received the injuries which resulted in his death (Tr., 15–16).

The Law of the Case.

On June 29, 1906, Congress passed a law, commonly called the *Hepburn Act* (34 Stat. L., pp. 584, 585), prohibiting railroad companies, after January 1, 1907, under heavy penalties, from permitting or allowing any persons, with a few exceptions, to use on an interstate trip "any interstate free ticket, free pass or free transportation"; and the Act further provided that "*any person* * * * who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty."

Construing this Act, the Interstate Commerce Commission had, in a unanimous opinion ren-

dered more than a year prior to the trial of this case, ruled that Railway Mail Service employes were prohibited from riding free "for their personal pleasure or profit," or when in the discharge of their public duties, or when not traveling under orders from a superior officer—Commissioner HARLAN holding :

> "It is clear to me that an inspector who uses *free* transportation, except in connection with the *actual performance* of his duties, or on the return journey, would be guilty of a breach of the law and that a carrier *knowingly* permitting him to use free transportation for his *personal benefit or pleasure* would also subject itself to the penalties of the law."
>
> *Vide*, Senate Document, No. 226, pp. 27, 28, 60th Congress, First Session, entitled "Decisions Relative to Railroad Passes and Free Transportation."

THE EVIDENCE.

It is conceded by defendants in error that Schuyler had *not* paid fare but used his *official* commission to make the trip from Ogden, Utah, to San Francisco, California, and return, and, at

the time of the accident, was using said *official* commission as the only evidence of his right to ride while returning from San Francisco to Ogden (Tr., 38, 39). And *all the evidence* shows he was not officially on duty. Witness Stephens, Superintendent of the Railway Mail Service in full charge of the western end of that department of the federal government (Tr., 90), testified :

> "Q. Had Mr. Schuyler, as Assistant Chief Clerk at Ogden, at and prior to January 14th, 1907, authority to, or was he expected to, travel on trains on official business excepting when acting as Chief Clerk, or in the absence of the Chief Clerk, or under authority from the Chief Clerk, or yourself as District Superintendent?
>
> "A. No, sir" (Tr., 65).

Mr. Rhodes, Schuyler's chief in the office at Ogden, testified that this necessary authority or direction to travel was not extended to Schuyler on this or any other occasion, and by the same token it follows that *this trip*, made without this requisite order from his superior, could not have been *official*.

> "Q. In point of fact, while you were Chief Clerk, who did the actual traveling for the Chief Clerk—did you, as Chief Clerk, do it, or did you delegate it to your assistant?

"A. I *never* have delegated it to my assistant.

"Q. You attended to that in person?

"A. Yes, sir" (Tr., 88).

And again, Rhodes finally and absolutely clinches the case, and characterizes Schuyler's trip as purely personal, when, in answer to questions by counsel for defendants in error, he testified:

"Q. Did you ever delegate Mr. Schuyler, during your incumbency as Chief Clerk, to go out on the road on official business?

"A. No, sir.

"Q. Are you sure of that, Mr. Rhodes?

"A. Yes, I am sure that I *never* delegated him *at that time*" (Tr., 89).

Witness Rhodes further explains the true object of Schuyler's trip as follows:

"Q. Do you recall Mr. Schuyler leaving Ogden some time in January, 1907, to come to Alameda, California?

"A. I do.

"Q. Do you recall his coming to you with any news or intelligence concerning his family, just prior to his departure?

"A. He had received word of the death of his little boy.

"Q. Where had his little boy died, according to your understanding?

"A. In Oakland.

"Q. There was no *official* business requiring him to make such a trip at that time, was there?

"A. Nothing had been planned.

"Q. There were no instructions given by you concerning the matter of what he should do?

"A. No, sir" (Tr., 87).

"Q. In point of fact he left just as soon as he could be conveniently transported, taking the next fast train out?

"A. He took the first train that would land him in Oakland first."

"Q. What train was that?

"A. That was the westbound fast mail, *an exclusive fast mail train*" (Tr., 88).

Mr. Stephen's further testimony leaves no doubt but that Schuyler's trip was entirely personal, and just such traveling as the anti-pass clause of the Hepburn Act was, according to the ruling of the Interstate Commerce Commission, designed to prohibit. He, as the head of the Postal Service in the western district, officially expurgated all semblance of official character from Schuyler's trip when he testified that an

official of the Postal Service would be "entitled to actual necessary living expenses" when traveling upon official business, but that he would not have approved an expense account for such a journey as this one of Schuyler's (Tr., 95).

> "Q. Why not, Mr. Stephens? * * *
>
> "A. Well, I would consider it was not a trip in which he was transacting sufficient business for the government. *I do not think the government would be justified in paying any expenses incidental to a personal trip*" (Tr., 96).
>
> "Q. * * * Did he, or did he not, take his departure for Ogden, under any arrangements made by you, looking to the transaction by him of any business?
>
> "A. As far as I know, *he did not*" (Tr., 94).

Stephens again shows he recognized and understood Schuyler was *off duty* on this personal mission on account of his bereavement, for he further testified, in answer to a question by counsel for defendants in error:

> "Q. Did you order him to report to duty at that time?
>
> "A. *No, sir.* In our conversation I gave no direct order for him to *report to duty;* that

goes with his position; he is to *get back to duty* as soon as possible" (Tr., 97).

Schuyler's conduct and deportment indicate that the trip in question was *entirely personal*, for we find that on reaching the post-office headquarters in San Francisco, when he presented himself at the office of Superintendent Stephens —making what the latter denominates as a "courtesy call" (Tr., 91)—he did not take up nor discuss any matter of business, but, as Stephens testified, "he [Schuyler] informed me of the death of his child by diphtheria, as I remember it, immediately after I entered the room; I think he was in my office and I returned to it from some other point in the building" (Tr., 90).

> "Q. After he announced the death of his child, everything discussed or talked about by you was of a personal nature, about his misfortune in losing his child?
>
> "A. *Everything talked about was his misfortune entirely*, except as I have stated, as to how things were getting along in Ogden and about his departure" (Tr., 92).

DECISION OF SUPREME COURT OF UTAH HOLDING (*a*) THAT SCHUYLER WAS NOT ON DUTY WHEN KILLED; (*b*) THAT INSTRUCTION NO. 2 WAS ERRONEOUS.

(*a*) "*We think the only conclusion authorized from the evidence is, that he was traveling in the mail car on account of matters personal to himself and wholly unconnected with his service to the Government*" (Tr., 126; 37 Utah, 592).

> "And, as already held by us, *we do not find sufficient evidence to support the verdict which was rendered thereon*" (Tr., 128; 37 Utah, 595).

Again, in the *second* opinion, the court held:

> "We have reread the record and again reached the conclusion that there is no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance of duties, pertaining to the Railway Mail Service. Upon the evidence adduced the only permissible inference is, that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of such a mission when the train was derailed. Whatever presumption might

be indulged under other circumstances that he was in the discharge of railway mail duties from the facts that he was a railway mail clerk and was in a mail car *is entirely overcome by the affirmative and direct showing that there was no business or engagement relating to his service which occasioned, or required the trip to be made by him;* that no directions, instructions, or requests, were given to or made of him in respect thereof; that duties on the road had theretofore always been performed by his chief and not by the deceased, and that the trip was occasioned *solely on account of the death of his child*" (Tr., 130; 37 Utah, 595–6).

(*b*) In condemning the verdict, and in holding Instruction No. 2, on which it was based, to be erroneous, the court said:

"In this connection the court also charged the jury that it was undisputed that the deceased was an employe of the railway mail service, and that at the time of the injury he was in a mail car 'on the defendant's line of road, and I charge you the presumption is that he was there *lawfully and rightfully, in the discharge of his official duties as such employe*, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of

all the evidence,' but that the presumption would be overcome if it was shown by affirmative proof and by a preponderance of the evidence that he was not in the discharge of his official duties. The relation of carrier and passenger for hire between the defendant and deceased was in effect alleged by the plaintiffs, or such a relation as gave the deceased rights of a passenger and imposed upon the defendant corresponding duties and obligations of a carrier of passengers. Such a relation was denied by the defendant. The burden was upon the plaintiffs, not the defendant, to establish it. That burden did not shift, but rested upon the plaintiffs throughout the case. And if upon all the evidence it was not established by a fair preponderance, the plaintiffs, and not the defendant, must fail. The charge of the court is not only in conflict with these well-recognized principles, but also invaded the province of the jury on the weight to be given a mere inference of fact. It in effect told the jury that a certain presumption of law arose, that is, that a definite probative weight in law attached by reason of certain undisputed facts, and that the burden was cast on the defendant to overcome it by affirmative proof and by a preponderance of the evidence. What the court thus incor-

rectly characterized a presumption of law by instructing the jury to give it a definite probative effect, was, at most, a mere inference of fact, and a fact, too, which, under the charge of the court and the law of the case as given the jury, was essential to plaintiff's right of recovery" (Tr., 127; 37 Utah, 593).

Final Decision of the Supreme Court of Utah.

After holding, as appears from the foregoing quotations from the opinions, that the evidence failed to support a recovery on the theory that deceased was traveling on duty when killed, the Court, in the second opinion, held:

1. That under the Act of Congress of June 21, 1906, commonly designated as the Hepburn Act, Railway Mail Service employes were in fact *entitled* to *free* transportation on *interstate* trips even when off duty (Tr., 136–137; 37 Utah, 604–5).

2. That notwithstanding the verdict of the jury was vitiated by erroneous Instruction No. 2, and even "though the construction which we have given the Hepburn Act should not be correct," and despite the question whether it was

unlawful for deceased to ride on his commission when not on duty, yet plaintiff in error knew he was in the mail car—*must have known*, so the court holds (though there was no evidence in the record of such knowledge), *that he was not on duty*—and it was therefore liable because it *permitted* him to ride in the mail car on his *official* commission, and had thereby *accepted* and was liable to him as a "gratuitous" passenger (Tr., 140).

Federal Questions Involved.

The jurisdiction of this Court is invoked because it clearly appears on the face of the record that there was set up and denied a defense based on a Federal statute, and there is present in the case a definite issue as to the correct construction of the anti-pass clause of the Hepburn Act so directly involved that the state court could not have given the judgment it did without deciding against the contention of the plaintiff in error.

The true test, as we understand it, as to whether a writ of error lies from the Supreme Court of the United States to the final judgment of a State court, is to be arrived at, not from mere averments in the pleadings, but from the matter

decided, as developed in the whole record. We submit, in the words of Mr. Justice BRADLEY, that this case "is pervaded from its origin to its close by United States law and United States authority" (*Provident Savings Society v. Ford*, 114 U. S., 642). That the record presents federal questions, entitling plaintiff in error to a hearing in this Court, which are sufficient to warrant a review and reversal of the case, is evidenced by the following epitomized statement of the points involved, which we will hereinafter present more in detail:

FIRST. The Interstate Commerce Commission —that branch of the federal government most concerned with the proper construction and enforcement of the anti-pass clause of the Hepburn Act—has decided, in a unanimous opinion, that Railway Mail Service employes are *not entitled* to receive or use *free* transportation on an *interstate* trip when *not on duty*.

Vide, Senate Document, No. 226, p. 27, 1st Session, 60th Congress.

In the second opinion by the State Supreme Court in this case (Tr., 137; 37 Utah, 604) the correctness of the ruling of the Interstate Commerce Commission is challenged, the court hold-

ing that "the Hepburn Act *does not forbid* a carrier from giving Railway Mail Service employes free *interstate* transportation when not on duty and when traveling for their own benefit and pleasure."

Under Article III., Section 2, clause 1 of the Federal Constitution, and Section 709 U. S. Revised Statutes, the proper construction and correct interpretation of this Act of Congress presents a federal question which this Court will review and settle on this writ of error.

In *Briscoe vs. Southern Kansas Ry. Co.*, 40 Fed., 277, it was held at p. 277:

> "When it appears that some * * * right * * * on which the recovery depends will be defeated by one construction of a law of the United States or sustained by the opposite construction, the case will be one arising under a law of the United States and one of which the federal courts have jurisdiction."

SECOND. Congress having provided who had and who did not have a right to free interstate transportation, under Article VI., Paragraph 2 of the Federal Constitution, its Act became the supreme law of the land on that subject, "and the judges in every State

shall be bound thereby." This Court in *American Express Co. vs. United States*, 212 U. S., 522, held, according to paragraph three of the syllabus: "The power of Congress over *interstate* transportation embraces *all manner* of carriage whether *gratuitous* or otherwise." It was, therefore, beyond the power of the lower court to read into the statute an exception, not provided for in the Act, in favor of "gratuitous" passengers.

The right to determine what *gratuitous interstate* transportation may be given or used is clearly a matter wholly within the legislative power of Congress, so as to give this Court jurisdiction of all questions arising out of that subject. It follows therefore that the second ground of the State Court's decision does not deal with a purely local law or rule of decision or a subject within the powers of a State. When Congress acted on the subject of regulating what interstate free transportation might be given and used that statute *superseded* all other laws and rules of decision in the States, and the State courts were thereby precluded from reading into the statute other exceptions tending to enlarge the class to whom such transportation may be given, for the field of policy and legislation was thus assumed

by Congress and withdrawn from the State's power. The refusal of the State Court to accord controlling influence to the Federal Act constitutes reversible error.

(*a*) While it may be conceded that this Court will not enter upon an inquiry as to whether the judgment of a State court is against the weight of evidence, nevertheless the questions as to the sufficiency, competency or legal effect of the evidence to establish or deny a *right* under a *federal* statute will be reviewed by this Court.

The Seventh Amendment guarantees the right of trial by jury, and the Fourteenth provides that none shall be denied due process of law. *Ziegler vs. S. & N. A. R. Co.*, 58 Ala., 594, holds at p. 599:

> "If any question of *fact* or *liability* be conclusively *presumed* against him, this is not due process of law."

Under this heading we submit that in *assuming* Schuyler had been knowingly *accepted* by the company as a *gratuitous* passenger on this interstate trip in violation of the Act, the State Court transgressed these constitutional provisions—in effect convicting the railroad company of violating the provisions of the Hepburn Act—and

this, too, *without any evidence* to support such a finding.

In *Creswill vs. Knights of Pythias*, 225 U. S., 246, this Court held, according to the syllabus:

> "While this court does not as a general rule review findings of fact of the state court on writ of error, where a Federal right has been denied as a result of a finding of fact and it is contended there is no evidence to support that finding and the evidence is in the record, the resulting question is open for decision; and where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to require the facts to be analyzed and dissected so as to pass on the Federal question this court has power to do so."

Our point on this head comes within this rule, since our insistence here is that there is not a syllable of evidence to be found in the record justifying the conclusion of the State Supreme Court that either the conductor, the crew, or the company acquiesced in Schuyler's breaking the law, or knew he was not on duty, or that he was unlawfully using his official commission.

U. P. R. R. Co. vs. Nichols, 8 Kan., 505.

Harmon vs. Jensen, 176 Fed., 519.

(*b*) The admitted facts are (1) that Schuyler rode in the mail car, in "an *exclusive* fast *mail* train" (Tr., 88); (2) no provision having been ma[illegible]r Schuyler's trip he *borrowed* the bed or cot to enable him to ride there (Tr., 67); and (3) he used his *official* commission to obtain the ride (Tr., 38–9). In this way he misled the company and succeeded in inducing his carriage *as a railway mail service employe.* Inasmuch as he was not on duty, but was attempting to ride in violation of the federal statute, he was a trespasser. His presence on the train was sounded in fraud and misrepresentation, and no such relation existed between him and the company as to give him the rights of a passenger.

Duncan vs. Maine C. R. Co., 113 Fed., 508.

U. P. R. Co. vs. Nichols, 8 Kan., 505.

Fitzmaurice vs. N. Y., etc., R. Co. 192 Mass., 159.

Brown vs. M. K. & T. R. Co., 64 Mo., 536.

Moore vs. Ohio River R. Co., 41 W. Va., 160.

Way vs. C. R. I. & P. R. Co., 64 Iowa, 48.

Condran vs. C. M. & St. P. R., 67 Fed., 522.

Toledo, W. & W. R. Co. vs. Beggs, 85 Ill., 80.

Norfolk & W. R. Co. vs. Bondurant's Adm'r., 107 Va., 515.

Sessions vs. So. Pac. Co., 159 Cal., 599.

(*c*) Assuming the company *could* have granted Schuyler a *free* interstate ride under the Hepburn Act, still it was *not required* by that law to do so.

Ill. Cent. R. Co. vs. Dunnigan, 95 Miss., 749.

The burden rests on a mail clerk to show that he was rightfully and lawfully on the train.

Hoskins vs. Nor. Pac. Ry. Co., 39 Mont., 394.

And there is no evidence in this record even tending to make this necessary showing.

Assignment of Errors.

FIRST. The Court erred in deciding that paragraph 4, Section 1, of the Hepburn Act (34 Stats., 584) does not prohibit free transportation of mail clerks for an interstate trip when off duty.

SECOND. The Court erred in deciding that a railway train conductor or any member of a train crew, can give consent to a mail clerk riding free when off duty so as to bind the railroad company or constitute him a gratuitous passenger on an interstate journey.

THIRD. The Court erred in holding that plaintiff in error, its conductor or other employees, did in fact consent to decedent's riding free on an interstate trip when off duty.

FOURTH. The evidence showing and the court deciding that deceased was not on duty as a mail clerk when killed, the Court erred in holding and deciding that judgment could be recovered on the theory—not submitted to the jury—that he was a gratuitous passenger on an interstate trip riding with the consent of the company and its employees, when in the complaint filed it was charged and alleged that he was riding as a mail clerk in the performance of his duties under an arrangement between the government and the railroad company for the transportation of the mails and mail clerks in charge thereof.

FIFTH. The Court erred in refusing to set aside the verdict because of a fatally defective instruction (No. 2) wherein the trial court directed the jury that they were to indulge the

presumption that deceased was rightfully on the train at the time of the accident and in holding that the burden was on the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence, and by evidence strong enough to produce conviction (Tr., p. 25).

SIXTH. The court erred in failing to set aside the verdict because of the refusal of the trial court to instruct the jury as requested in plaintiff in error's instruction numbered 3, as follows:

> " You are therefore instructed that if you find from the testimony in this case that Charles Albert Schuyler, at the time of the accident in which he received the injuries from which he thereafter died, had made the journey from Ogden to San Francisco to attend the funeral of his child, or on any other personal business of the said decedent's, and while returning therefrom received the injuries in question from which he thereafter died, then the plaintiffs, and each thereof, would be precluded from recovering in this case, and your verdict should be for the defendant " (Tr., p. 20).

SEVENTH. The court erred in failing to set aside the verdict because of the refusal of the

trial court to instruct the jury as requested in plaintiff in error's instruction No. 5, as follows:

> " You are instructed that neither the conductor of the train nor any of the officers or agents of the railroad company could authorize or permit the said Charles Albert Schuyler to ride on its trains, when not on duty, without paying the regular and full fare charged in its tariffs for like transportation of other persons " (Tr., p. 20).

FIRST POINT.

Railway Mail Service employes are prohibited by the anti-pass clause of the Interstate Commerce Act from using their official commissions to obtain free interstate rides when off duty or when not in the discharge of their public duties.

By the plain terms of the Hepburn Act it is clear that Congress intended to prohibit, except in a few limited cases or on occasions when persons are traveling in certain designated capacities, the giving or receiving of free interstate transportation on the railroads in this country.

L. & N. R. Co. vs. Mottley, 219 U. S., 467.

(*a*) *The Interstate Commerce Law*:

Section I., paragraph 4 (34 Stat. L., p. 584), provides:

> "No common carrier subject to the provisions of this Act, shall, *after January* first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, phy-

sicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employes, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents and

employes of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty.

SECTION 2. That if any common carrier, subject to the provisions of this Act, shall directly or indirectly, by any special rate, rebate, drawback, or *other device*, charge, demand, or collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such

common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

SECTION 6. * * * Nor shall any carrier charge or demand or collect or receive a greater or less or *different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time.

SECTION 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed."

(*b*) *The Interstate Commerce Commission has ruled that employes in the mail service are not entitled to free transportation when not on duty:*

Construing the Hepburn Act the Commission, on June 21, 1907, unanimously ruled that employes of the Railway Mail Service were not entitled to travel free on railroad trains when not on duty. The opinion of the Commission, which we quote in full, will be found in Senate document No. 226, page 26, of the first session of the 60th Congress, entitled Decisions relative to railroad passes and free transportation.

"June 21, 1907. DEAR SIR: In your letter of the 7th you inclose a copy of your communication of the same date to the president of the St. Louis and San Francisco Railroad Company, in which you expressed the opinion that railway mail service employes and post office, customs, and immigration inspectors might use free transportation, not only while in the discharge of their public duties but also when traveling unofficially and for their personal pleasure or profit. I need not assure you that in reading this expression of your interpretation of the so-called anti-pass clause of section 1 of the act I indulged the presumption that your construction of it must necessarily be the correct one. I am compelled to say, however, that a further and more careful examination of that provision has led me to a different conclusion, which I will now endeavor to set forth as clearly and as briefly as possible as a further response to your inquiry.

"If you will again examine that clause of section 1 you will see that the several classes of persons who may lawfully enjoy free transportation as they are there enumerated seem to divide themselves into three groups as follows: (1) To its employes and their families, its officers, agents,

surgeons, physicians, and attorneys at law; (2) to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons * * * to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and for Soldiers' and Sailors' Homes * * * and Boards of Managers of such Homes; (3) to necessary caretakers of livestock, poultry and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employes, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons.

"1. The classes enumerated in the first group are limited, as you will see, to persons actively connected with the operation of railroads or with the administration in various capacities of their affairs.

"2. The classes enumerated in this group

embrace persons who are either engaged in administering charities or are the object of charitable aid.

"3. The classes enumerated in this group have to do with the affairs of persons, firms, or corporations engaged in business along the line of railroads. They are in the service of such other companies or persons and are not in the employ of the railway companies.

"It seems clear that if a railroad company is willing to give free transportation to its own employes when traveling on personal account no public interest or principle of public policy is adversely affected. I have no difficulty therefore in holding that the persons comprised within the first group of enumerated classes may use transportation for their personal benefit or pleasure.

"Now, as to the second group: There seems to be no reason why a railroad corporation, as well as a private citizen, may not do charity without offending public policy. And as persons who give their lives to religious and charitable works are usually excluded from the attainment of wealth and usually enjoy limited incomes, I have little difficulty in concluding that carriers, if they choose to do so, may give them annual passes to be used by them when

traveling in connection with the charities which they are administering or when traveling for their personal benefit or pleasure. Perhaps this could not be said of persons who are the objects of charity. There is little likelihood, however, of any abuse in connection with such persons of the right to give and receive free transportation.

"The third group seems to stand in an altogether different position. That part of the clause seems to me to have been intended to enumerate a class of *capacities* rather than of persons, and to *imply a limitation of the right to use free transportation to the occasions of actual employment in the designated capacity.*

"If the reason of the law as well as its precise terms is to be taken into consideration in construing the anti-pass provision, it would seem to be clear, for example, that a person who serves as caretaker of a shipment of live-stock, poultry, or fruit can not lawfully use free transportation, except while actually so engaged or on his return journey. The words 'employes on sleeping cars and express cars' clearly imply a limitation to occasions when such employes are actually engaged in their respective capacities, and, as an incident to such right, when returning from such employment. I cannot

believe that the intent of Congress was to open the right of free transportation to such persons *for their personal pleasure and profit.* And if this be true as to them it necessarily follows that the same limitation is imposed upon linemen of telegraph and telephone companies, upon newsboys, baggage agents, witnesses for carriers in pending cases, and nurses and physicians called in cases of accident or similar emergency. And if the limitation applies to those enumerated classes how can it be said that the *restriction* does not apply also to *employes of the railway mail service* and to post-office, customs, and immigration inspectors ?

" I realize, of course, that it would be wholly impracticable to supply persons of the classes enumerated in the third group with special passes for each trip when on duty or to issue trip passes for the return journey. It may be also that it would be *difficult* for a carrier to ascertain whether such a person using an annual pass was returning from his employment or was traveling for his personal pleasure or profit. But it is clear to me that an inspector who uses free transportation, except in connection with the actual performance of his duties, or on the return journey, would be guilty of a breach of the law, and that a

carrier *knowingly* permitting him to use free transportation for his *personal benefit* or pleasure would also subject itself to the penalties of the law.

"It may be well to add that I submitted this construction of the anti-pass clause to my colleagues in conference on Monday last, and that it met with their approval. So that what is here said may be taken as the view of the Commission, so far as it may be responsive to your specific inquiry in relation to railway mail service employes and post-office, customs, and immigration inspectors."

In the same clause where "Railway Mail Service employes" are mentioned in the Act, "customs inspectors" are named, and as to them the Interstate Commerce Commission has ruled:

"The Commission has had occasion to consider the question presented by you and has reached the conclusion that only "customs inspectors" proper, that is to say, those customs officers who have occasion to travel upon the railroads *in the discharge of their duties* as inspectors of merchandise, are entitled to free transportation."

Vide, Senate Document, No. 226, p. 25 (1st Sess. 60th Congress).

(*c*) *Congress has impliedly sanctioned this interpretation of the Act:*

It is a cardinal rule of statutory construction, and one often applied by this Court in interpreting Acts of Congress, that, where an Act or any clause thereof which has received a practical construction by the executive department of the government charged with its execution is reenacted in the same terms, Congress is presumed to have been familiar with such construction, and to have adopted it as a part of the law.

The Interstate Commerce Commission is vested with broad powers "to execute and enforce the provisions of the Act," and its rulings are entitled to and are given great weight by this Court and by Congress. Commencing immediately after the passage of the Act on June 29, 1906, the Commission was frequently called on to pass on many questions arising out of differing contentions as to the proper construction of the Act; and it will be found that, whenever the interpretations of the Commission were at variance with the intent of Congress, that body promptly amended the Act to remove all obscurity. To illustrate: when in the first ruling the Commission held there was doubt as to whether the expression "employees" used in the anti-pass

clause of the Act permitted the free interstate transportation of bodies of employees killed in the service, Congress, to more clearly express its intention, thereafter, on April 13, 1908 (35 Stat. L., 60), cleared up all doubts by *amending* the Act to include "the remains of a person killed in the employment." Again, when the Commission ruled that the exception in favor of the "families" of employees did not include the dependent families of employees killed in the service, Congress met the situation and, at the same time (35 U. S. Stat., 60), amended the provision so as to permit the granting of free transportation to "the families of persons killed while in the service of any such common carrier." And again, when question arose as to whether employees off on leave or those who were pensioned, or were off on account of physical disability, could have free transportation, and the Commission had ruled, March 13, 1907 (Senate Document No. 226, 1st Sess., 60th Congress, pp. 18, 19), that such "ex-employees—persons no longer actually sustaining that relation to your company and carried on your payrolls in that capacity" could not be given free transportation, Congress responded in the Act of April 13, 1908, by amending the law

so as to authorize granting passes to "furloughed, pensioned, and superannuated employees" and to "persons who have become disabled or infirm in the service" (35 Stat L., 60). Still later, when the Commission had ruled, and the Circuit Court agreed (*United States vs. Wells-Fargo Express Co.*, 161 Fed., 607), that the exception in the Act permitting interchange of free passes between the employees of "common carriers" was not intended to permit the issuance by "express companies" of "franks" or passes to the officers of railroad companies, Congress by an Act as late as June 18, 1910, set the ruling aside by *again* amending the statute so as to provide that "the term 'common carrier' as used in this Act shall include express companies" (36 Stat. L., 545). Other instances could be cited showing that when the rulings of the Commission were in apparent conflict with what Congress intended, that body has invariably promptly removed all doubt by changing or amplifying the law.

The above-quoted ruling of the Commission, holding that the exception in the Act in favor of Railway Mail Service employes did not authorize them to travel free except when riding in their officially designated capacities and on duty,

was rendered June 21, 1907, more than five years ago; and although, in response to a resolution from the Senate this ruling was officially reported to Congress and was there ordered printed and published (Senate Document, 226, 1st Sess., 60th Congress), the law was not then or thereafter amended or altered in this particular, though, as indicated above, the statute was *twice* thereafter amended otherwise (April 13, 1908, 35 Stat. L., 60, and June 18, 1910, 36 Stat. L., 546), and the anti-pass clause changed in other respects to correct or supersede the Commission's other rulings quoted. On each occasion the statute was reenacted without alteration or change to discountenance the construction and ruling of the Commission denying Railway Mail Service employes free rides when off duty.

It was held by this Court in *New Haven R. R. vs. Interstate Commerce Commission*, 200 U. S., 361, at p. 401:

> "* * * Without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce

is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and *has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed*, when not plainly erroneous, must be treated as read into the statute."

In the *United States vs Hermanos y Compania*, 209 U. S., 337, where was brought into question the correctness of the Treasury Department's construction of a provision of the tariff act, this Court held at p. 339:

" We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution *Robertson vs. Downing*, 127 U. S., 607; *United States vs. Healey*, 60 U. S., 136. And we have decided that the re-enactment

by Congress, without change, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction *United States v. Falk*, 204 U. S., 143, 152.

"Mr. Justice WHITE and Mr. Justice PECKHAM concur *solely* because of the prior administrative construction."

(*d*) *Purpose of the Anti-Pass Act:*

The reason for this law was well stated by the Interstate Commerce Commission in the ruling of March 29, 1907, reported in Senate Document 226, *supra*, p. 22, where, among other things, it is said:

"* * * A railroad is a public highway in legal effect substantially as is an ordinary highway. It is none the less so because it is constructed and is operated by private persons or by a corporation organized for that purpose. That fact simply establishes a private property right in the highway, which must, of course, not only be respected and protected, but be amply rewarded from its earnings. It remains, however, a public highway. Its operation is a public function in which all citizens have an *equal interest* and the right under the same circumstance to be treated alike." * * *

> " All this emphasizes the right of the public to enjoy *equal privileges* at the hands of a railroad company."

To the same effect is the ruling of this Court in *C. I. & L. R. Ry. Co. vs. U. S.*, 219 U. S., 486.

Chief Justice WHITE in *New Haven R. R. vs. Interstate Commerce Commission*, 200 U. S., 361, said, at page 392:

> " If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? *It was to compel the carrier as a public agent to give equal treatment to all.*"

And again, at page 391:

> " It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all *and to destroy favoritism.*"

(*e*) *To have granted Schuyler, or for him to have used, free interstate transportation would constitute just such discrimination as the statute was designed to abolish:*

Tested by the foregoing reasons underlying the anti-pass clause of the statute it is at once

apparent there is no reason why a mail clerk, merely because he is such, should be favored above other individuals. In fact there is good reason, shown in the record in this case, why such a discrimination should not have been made in Schuyler's favor. Mrs. Schuyler testified that her husband was engaged in *other business* when not on duty as a mail clerk; that he turned in to the family the total salary received as a mail clerk while located in California and as assistant chief clerk in Utah and he lived on his earnings from *other business* in which he was engaged; that he had other sources of income; "other ways of contributing," "which raised his income" (Tr., 52); that he engaged in the "real estate" business. "He *always* made a few dollars on the outside, turning real estate" (Tr., 52–54). Now, if Schuyler when off duty was competing with other real estate dealers in Ogden, Utah, and in Oakland, California, on what conceivable theory can it be urged that he was entitled to *free* transportation or had a right to use his official commission as an assistant chief clerk in the Railway Mail Service to promote his *personal* business? To permit the use of free transportation by him when off duty or not in the discharge of his *public* duties would amount to just such dis-

crimination as the Hepburn Act, the frequent rulings of the Interstate Commerce Commission and the decisions of this Court condemn.

(*f*) *Schuyler's Commission:*

The assumption evidently indulged by the State court that the commission held by Schuyler was some sort of pass which, when issued by the government was intended to *entitle* him to free interstate rides when off duty is not warranted by any words or expression therein. As its name implies it is in fact really nothing more than the certificate or credentials issued by the government certifying to his appointment and authority. The first sentence shows this:

> "The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk, railway mail service, with headquarters Ogden, Utah, and will be obeyed and respected accordingly" (Tr., 38).

It is this commission, containing their photographs, which identifies Railway Mail Service employes as such and which they use as evidence of their right to be on mail trains or in mail cars *when in the discharge of their public duties.*

The succeeding sentences are:

> "Railroad companies are *requested* to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given."

There is nothing in this, we submit, to show, or which tends to indicate, that the government ever contemplated or intended that this commission should be used by the holder to promote his *personal* business or to secure his transportation on that account. The first sentence accredits him as an officer in the government service. The next sentence *requests* that he be extended free transportation to facilitate his work as such officer. Clearly this must be so, for what possible interest could the government have in his procuring a receipt when, as provided in the last sentence, "fare is charged," unless it be to arrange for refund on his expense account—and he could have such account against the government only when traveling on its business in the discharge of his public duties. The use of the word "requests" does not imply that the government is soliciting free transportation in the interest of the employee personally. In *Illinois Central Ry.*

Co. vs. Dunnigan, 95 Miss., 749, it is pointed out that the railroads are *not compelled* to grant free transportation to any of the excepted classes named in the Act, but "can withhold at its pleasure" such transportation if it so desires. It is evident, therefore, that this commission was only issued to Schuyler for use "in connection with the actual performance of his duties," as was held by the Interstate Commerce Commission.

It may be conceded that *prior* to the Hepburn amendment some railroads had theretofore permitted mail clerks to ride on their commissions, as indicated by some of the decisions; but those cases cannot avail here because there is not a syllable of testimony in the record that any such practice had *ever* prevailed on plaintiff in error's road, and particularly is there no evidence that it was allowed after that Act. Even if it had previously been accepted or regarded as entitling the holder to free rides when off duty, it became null and void for that purpose when the Act went into effect January 1, 1907, at least so far as free interstate traveling when off duty was concerned.

Little Rock Ry. & Elec. Co. vs. Dowell, 142 S. W., 165.

L. & N. R. Co. vs. Mottley, 219 U. S., 467.

SECOND POINT.

It was beyond the power of the State Court to read into the Hepburn Act an exception in favor of "gratuitous" passengers, thereby evading the effect of the law and attempting to enlarge the class to whom Congress had limited the right of free interstate transportation.

In determining whether a federal question is involved, it is immaterial that the State Court construed the case as one falling within the principles of general law untrammeled by statutory enactments. The extent to which, if at all, a federal statute affects, limits or abridges a right, presents a federal question.

Article VI, paragraph 2, of the Federal Constitution provides that the "Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land: and *the judges in every State shall be bound thereby.*" In holding, as the second ground of its opinion, that even "though the construction which we have given the Hepburn Act should not be correct," and in attempting to allow a recovery in this case notwithstanding the denial by the federal law of a

right in Schuyler to "gratuitous" passage, the State Supreme Court evaded and disregarded this constitutional provision. This second ground of the decision was an invasion of the field over which Congress alone had authority and amounts to an unauthorized attempt either to read into the statute an exception not provided for therein, or to create by mere rule of decision a right which the statute expressly denied. When Congress acted on the subject of regulating what interstate free transportation might be given and used, the State courts were thereby precluded and debarred from enlarging by purely local rule of decision the classes which could have and use such transportation; and the holding of the court that Schuyler had rights as an "accepted gratuitous passenger," is indefensible and clearly erroneous. This Court in *American Express Co. vs. United States*, 212 U. S., 522, set at rest all notions that a right to *gratuitous* interstate transportation could exist apart from the terms of the Hepburn Act, when at page 532, it held:

> "It is contended that * * * it was not the purpose of Congress to regulate in these provisions *gratuitous* transportation. * * * But the power of Congress over interstate transportation embraces all man-

ner of carriage of that character—whether *gratuitous* or otherwise."

The Hepburn Act is the declaration and final legislation on matters of free *interstate* travel, and is the one index to be referred to to determine who may and who may not have gratuitous transportation for interstate trips. It was said in *Armour Packing Co. vs. U. S.*, 209 U. S., 56, 82, " the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce." And it is familiar law that when Congress has legislated on any subject—such as interstate regulations, whether on free passes, freight rates, or interstate carriers' liability—such legislation *supersedes* all State legislation and all rules of decision of the State courts on that subject. It follows, therefore, that the Hepburn Act is the paramount and sole existing law on the subject of *free interstate* transportation, whether it is called gratuitous or free, and that law alone must be looked to to determine who may or who may not use free transportation on such a trip. As was held in *Fulgham vs. Midland Valley R. Co.*, 167 Fed., 660, 662:

" It is clear that the act of April 22, 1908 [Masters' Liability Act] *superseded and took*

> *the place of all state statutes* regulating relations of employers and employes engaged *in interstate* commerce by railroads."

To the same effect is the ruling of this Court in *E. P. & N. E. Ry. Co. vs. Gutierrez*, 215 U. S., 87, where, in the last paragraph of the syllabus, it is said:

> "The Employers' Liability Act * * * being a constitutional *regulation* of commerce * * * *necessarily supersedes* prior territorial legislation on the same subject."

In *Cound vs. A. T. & S. F. Ry. Co.*, 173 Fed., 527, speaking of the same Act, it was said, at p. 531:

> "Indeed, the act is the law, *and the only law*, under which suits like the present one may be brought. It is *the law* of the case, by which the rights of the employe and the liability of the carrier are measured."

In *United States vs. Colorado & N. W. R. Co.*, 157 Fed. Rep., 321, 330, SANBORN, J., held:

> "The Constitution reserved to the nation the unlimited power to regulate *interstate* and foreign commerce. * * * That power is not subordinate but is paramount

> to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way."

It follows from the foregoing that the State Court's ruling that Schuyler had rights as a "gratuitous" passenger, was in effect only another way of saying he could use "free" interstate transportation when off duty, but, as heretofore shown, the State Court erred in this as the ruling of the Interstate Commerce Commission, in which Congress has so long acquiesced, shows this is not the law.

(*a*) *There is no presumption that the railroad company violated the statute and granted Schuyler a free interstate ride; and there is no evidence in the record to support such conclusion:*

Mr. Chief Justice WHITE, in *Creswill vs. Knights of Pythias*, 225 U. S., 246, quite recently stated the rule in this Court, at p. 261:

> "While it is true that upon a writ of error to a state court we do not review findings of *fact*, nevertheless two propositions are as well settled as the rule itself, as follows: (*a*) that where a federal right has

been denied as the result of a finding of *fact* which it is contended *there was no evidence whatever to support*, and the evidence is in the record, the resulting question of law is open for decision; and (*b*) that where a conclusion of law as to a federal right and finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the federal right."

To sustain the holding of the State Court that plaintiff in error accepted Schuyler as a gratuitous passenger on this interstate trip requires evidence which would, in effect, convict it of having knowingly violated the penal provisions of the Hepburn Act. That Act makes it a federal offense for a carrier to give such transportation.

United States vs. Williams, 159 Fed., 310.

But, we submit, there is no testimony whatever to warrant the conclusion or sustain the holding of the State Court that plaintiff in error did carry Schuyler gratuitously. The only evi-

dence in the entire record on this point is that of Mrs. Schuyler who testified she was present when her husband entered the *mail car* and put his grips therein at Oakland for the return journey, and that the conductor was then standing nearby, and that the train agent saw her husband (Tr., 47–49). This single circumstance was grasped at below by the defendants in error, and adopted by the Supreme Court, to support the absolutely unwarranted assumption, injected into the case for the first time in the second opinion, that Schuyler was permitted to ride free as a gratuitous passenger. But when it is borne in mind that he was an official, assistant chief clerk in the government mail service, seeing him enter the *mail car* would not convey knowledge to the conductor that he was seeking to ride on a *personal* mission, but would be entirely consistent with the idea that he was rightfully entering such car in the discharge of duty; and when he *used* his "official" commission as the evidence of his right to be there, that fact strengthened and justified the conductor's impression that he was traveling in the mail car *officially*. In *U. P. Ry. Co. vs. Nichols* 8 Kan., 505, the court said:

> "The conductor, therefore, did not attempt to confer upon the plaintiff any right

> to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself."

In its ruling, *supra*, the interstate Commerce Commission recognized that it "would be *difficult* for a carrier to ascertain whether such a person * * * was returning from his employment or was traveling for his personal pleasure or profit". And it expressly stated that in such a case a carrier is only guilty of violating the Act for "*knowingly* permitting" a mail employe to travel free.

We submit with the utmost confidence that this Court will reverse the judgment in this case and rule that the conductor was not required to assume or fashion his conduct on the theory that Schuyler was trying to violate the penal provisions of the Act; to the contrary this Court will be justified under all the evidence in holding that neither the plaintiff in error nor its conductor *knowingly permitted* him to ride in violation of the Act. By *borrowing* a cot and bedding to enable him to ride in the mail car (Tr., 67, 88) and in using his *official* commission as the evidence of his *right* to be there (Tr., 38–9) he succeeded in carrying his unlawful scheme to com-

pletion, but he did not, as the State Court held despite the federal law, thereby obtain legal rights as a "gratuitous" passenger.

In the *Nichols case* (8 Kan., 505) plaintiff sued for injuries received in a collision. He worked for an express company doing business on defendant's line, and the conductor *knew* he was on the train in the express car, but *assumed* he was rightfully there working with the other express messenger doing the work of the express company, with which concern he knew his master, the railroad company, did business. Because of this he acquiesced in his riding, and it was in this way that he obtained the consent of the conductor to carry him without fare. In this aspect this *Nichols case* is on all fours with the Schuyler case. In the *Nichols case* the evidence showed that plaintiff was not in fact rightfully on the train doing work in the express car for the express company. In this Schuyler case the State Court has held, in both opinions, that the evidence conclusively shows deceased was not traveling as a Railway Mail Service employe or in the discharge of any duty as such. In the *Nichols case* the express messenger introduced plaintiff to the conductor "as an express messenger." In this Schuyler case the admission shows that

Schuyler *used* his *official* commission as the evidence of his right to transportation. We respectfully submit that the ruling of the Supreme Court of Kansas in the *Nichols case* is apposite here. In that case the Kansas court, in reversing the judgment in favor of the plaintiff, said at p. 515:

> "The conductor, supposing the plaintiff to be an express messenger, and therefore entitled to ride in the baggage car, and to ride free, or rather supposing that his fare was paid or arranged for by the express company in their contract with the railway company, allowed him to ride in the baggage car, and collected no fare from him. The conductor made no contract with the plaintiff, but allowed him to ride on the contract made between the plaintiff's supposed employer, the express company, and the conductor's employer, the railway company. The conductor supposed that the plaintiff was riding in the baggage car and free, by authority as high as that under which he himself acted, and by an authority which he had no power to revoke."

(*b*) *Schuyler induced his carriage on this interstate trip by fraud and misrepresentation. He was an unauthorized intruder on the train, en-*

gaged in the commission of a misdemeanor as defined in the Hepburn Act, and had no rights enforceable at law.

Our contention is that Schuyler's use of his *official* credentials at a time while he was on a *personal* trip and when in fact he was not in the mail car in the discharge of any duty for the government was just as fraudulent and misleading as would be the act, for instance, of a person who obtains a free ride by the presentation of an annual pass which had been issued to another. As we view it, the misrepresentation of which Schuyler was guilty consisted in the fact that he used his commission under circumstances which implied that he was in the mail car on duty. It might more accurately be termed a fraudulent concealment of fact; that is to say, at the time of using his commission he fraudulently concealed the fact that he was not there on duty. It is a familiar principle of law that when one remains silent under circumstances when it is his duty to speak, such silence is as fraudulent in all respects as an open misstatement of facts.

We submit that in arriving at the opinion last rendered that deceased was a gratuitous passenger traveling with the knowledge and con-

sent of plaintiff in error, the State Court reached a conclusion not supported by the evidence—in fact which there is no evidence whatever to support. The record will be searched in vain for a syllable of testimony supporting the conclusion that the conductor of the company knew that Schuyler was not, as he appeared, riding as an official of the Post-office department, but was merely attempting to obtain free passage. We think this Court will recognize at a glance that the State Court erroneously reached the conclusion that plaintiff in error or its conductor had full knowledge of all the facts of Schuyler's unlawful intention; and we submit with equal confidence that this Court will set aside the judgment for the reason that there is no evidence in the record supporting it or from which such conclusion can be properly inferred. In the *Nichols case*, *supra*, the court in passing on this phase of the case, said at p. 518:

> "It is true, that whenever a person who desires to become a passenger on a railroad does all that the law and the rules of the company require of him for that purpose, it will be presumed that the company has given its consent, and that the requisite contract has been made; for in such a case the

company could not legally withhold its consent. But whenever it is shown that such person has not done what is required of him, no contract will be presumed. *It will then devolve upon such person to show affirmatively* that a contract has been made *—to show affirmatively that the consent of the company has been given.*

" In the present case the plaintiff did not do what was required of him in order that he might become a passenger; he did not himself make a contract with the railway company, or any of its agents; and he had no right to ride under the contract made between the express company and the railway company. The consent obtained from the conductor was the consent that *an express messenger* might ride in the baggage car, and without paying his fare. Such consent did not apply to the plaintiff. But if it be said that the conductor applied it to the plaintiff, then it may be answered that *it was so done under a misapprehension induced by the plaintiff himself* in allowing himself to be introduced to the conductor as an express messenger, and represented to be such, when in truth and in fact he was not such messenger. This was a legal fraud upon the conductor, and upon the railway company, whatever may have been the intentions of the plaintiff."

In *Fitzmaurice vs. N. Y., N. H. & H. R. Co.*, 192 Mass., 159, the facts were that plaintiff, while riding upon a train of the defendant, was injured in a collision, and no question was made that she would have been entitled to a verdict in her favor if she had been a passenger. She was riding upon a three-months' season ticket, which was good only for a student under 18 years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate, purporting to be signed by her father, that she was under 18 years of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from school, and also presenting a certificate, purporting to be signed by "J. F. Miller, Principal, Hollander Art School, Boylston Street, Boston, Mass.," that she was a pupil in his school and he fully believed intended to remain so for the next three months. She was at this time over 18 years of age, as she testified, lived in Marlboro, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was $32. The reduced rate for students under age, at which the plaintiff procured it, was $16. She had been riding upon

the ticket nearly every day, except Sunday, for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words: "Good only for a person under 18 years of age." The jury having found the amount of the plaintiff's damage, if she were entitled to recover, the judge ordered a verdict for the defendant. Upon this state of facts, the Supreme Court of Massachusetts said at p. 160:

> "The defendant had the right to establish a reduced rate for students under a fixed age. * * * The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practiced upon the defendant. She had no right to profit by her fraud; she had no right to rely upon *the consent* of the railroad company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train. She was in no better

position than that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person traveling over a railroad on a free pass or a mileage ticket which had been issued to another by name and was not transferable was barred by his fraudulent conduct from recovering for a personal injury, unless it was due to negligence so gross as to show a willful injury. *Toledo, Wabash & Western Ry. Co. vs. Beggs*, 85 Ill., 80; *Way vs. Chicago, R. I. & P. R. Co.*, 64 Iowa., 48. *If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger*, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any willful or reckless injury. *Condran vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 67 Fed., 522, *Toledo, Wabash & Western R. Co. vs. Brooks*, 81 Ill., 245; *Chicago, Burlington & Quincy R. Co. vs. Mehlsack*, 131 Ill., 61. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practicing a fraud. The only relation which existed between the plaintiff and defendant was induced by her fraud; and, as was said by the court in

Way vs. Chicago, Rock Island & Pacific Railway, ubi supra, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See also, to the same effect, *Godfrey vs. Ohio & Mississippi Railway*, 116 Ind., 30; *McVeety vs. St. Paul, Minneapolis & Manitoba Railway*, 45 Minn., 268; *McNeill vs. Durham & Charlotte Railroad*, 31 Am. & Eng. Railroad Cas. (N. S.) 285.

"*Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her schemes to completion.* There had been a similar acceptance by the conductor in *Way vs. Chicago, Rock Island & Pacific Railway*, and *Toledo, Wabash & Western Railway vs. Beggs, ubi supra. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect.*"

In *Condran vs. Chicago, M. & St. P. R. Co.*, 67 Fed., 522, it was held:

"* * * 'On part of the plaintiff it is claimed that the deceased was in fact a passenger, whether he had paid his fare or not, and upon the part of the defendant it is claimed that the conductor permitted him to remain

upon the train without paying his fare, in consequence of the statements made by the deceased; that these statements were untrue; that thereby a fraud was committed by the deceased upon the company, and that the deceased could not, by fraudulent misstatements, obtain a free ride upon defendant's train, and then hold the company responsible to him the same as though he was a passenger paying fare. If the deceased in fact had money with him with which he could have paid his fare, but instead of paying the same he intentionally misstated his situation to the conductor, and by false representation induced the latter to allow him to remain on the train, then it could not be said that he was rightfully upon the train, but he would be there in fraud of the rights of the company, and the legal relation of carrier and passenger would not in such case exist between him and the company.' * * *

"The rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which to pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare and by means of such

false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of the carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to wilfully or recklessly injure him. *Railway Co. v. Brooks*, 81 Ill., 250; *Railroad Co. v. Michie*, 83 Ill., 431; *Railway Co. v. Beggs*, 85 Ill., 84; *Railroad Co. v. Mehlsack*, 131 Ill., 64; *McVeety v. Railway Co.*, 45 Minn., 269; *Robertson v. Railway Co.*, 22 Barb., 91; *Railway Co. v. Nichols*, 8 Kan., 505; *Prince v. Railroad Co.*, 64 Tex., 146; *Railway Co. v. Campbell*, 76 Tex., 175; *Way v. Railway Co.*, 64 Iowa, 48, *id.*, 73 Iowa, 463.

"The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its train under the conditions named the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice,

that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. But, if he had such authority, *his assent obtained by the fraudulent means mentioned would confer no rights.* One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured by an accident happening to the train, not due to recklessness or wilfullness on the part of the company, he cannot recover."

In *Way vs. Chicago, Rock Island and Pacific R. R. Co.*, 64 Iowa, 48, it was held at p. 51:

"When the decedent presented the ticket, we must presume that *he intended* to be understood as claiming that he had a *right* to travel upon it. * * * By the presentation of the ticket, the decedent falsely personated Forgrave, with the intention of deceiving the company; and he did deceive it, and to its injury, for by reason of the deception he escaped the payment of the full rate with which he was otherwise chargeable.

"It is not material, then, that the decedent obtained the conductor's consent.

Whether his consent would have bound the company, if he had known that the decedent was not Forgrave, we need not inquire; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was then at the time of the injury in the car, without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company *fairly* obtained. But no one would claim that a mere trespasser has such rights; and *it appears to us to be well settled that consent obtained by fraud is equally unavailing.*"

To the same effect see:

Harmon vs. Jensen,, 176 Fed., 519.

Sessions vs. So. Pac. Co., 159 Cal., 599.

Norfolk, etc., Ry. vs. Bondurant's Adm'r., 107 Va., 515.

Toledo, etc., R. Co. vs. Beggs, 85 Ill., 80.

Duncan vs. Maine C. R. Co., 113 Fed., 508.

Brown vs. M. K. & T. Ry. Co., 64 Mo., 536.
Moore vs. Ohio River R. R. Co., 41 W. Va., 160.

The cases cited in the lower court's second opinion are not in point, for in them there was either no statute prohibiting the plaintiff from accepting a free ride, or the railroad company *knowingly* accepted the plaintiff and actually permitted and acquiesced, or there was no deception practiced by plaintiff to obtain free passage. Nor is there any merit in the assumption advanced by the lower court that Schuyler had rights on the train because he, "in good faith, assumed and believed that the commission entitled him to so ride." It is elementary law, as was held by this Court in *Armour P. Co. vs. U. S.*, 209 U. S., 56, that accepting transportation in violation of the Act, although such action may have been taken in good faith, or even under a claim of right, is not a sufficient excuse legally for violating the Act.

It seems to us to be incontrovertibly true that if Schuyler had no right to ride on his official commission when not on duty, it must follow as an indisputable proposition of law that the mere fact that

he may have been acting in good faith in believing he had such right could not and did not confer any rights on him in the premises. In a prosecution for violating the Hepburn Act, the acts constituting the offense being admitted, this Court would not heed a plea that the accused *believed* he was not violating the law, or was acting in good faith. In the very recent case of *Harmon vs. Jensen*, 176 Fed., 519, plaintiffs sued to recover damages for injuries received in a collision on defendant's train. They were riding on free tickets issued to another person, but such other person had given them to plaintiffs. Plaintiffs, there, as here, attempted to claim some right to be on the train by alleging that they had acted in good faith in the use of the tickets; and the lower court instructed the jury that plaintiffs were lawfully on the train and could complain of the negligence resulting in their injury if they entered the train "*in good faith*, believing that such tickets were valid, and that they gave them full right and authority to ride thereon, * * * and if the conductor accepted the same without fraud or misrepresentation on the plaintiffs' part" (p. 521). The circuit court of appeals of the sixth circuit discountenanced and reversed the judgment (176 Fed., 519). In

the very recent case of *Clement vs. Dwight*, 121 N. Y. Supp., 788–791, defendant, a retail druggist, was sued for a penalty for violating the Liquor Tax Law in selling "Peruna." He defended on the theory that he "*acted in good faith* in selling the Peruna, believing it was a medicine." But the court would not listen to his plea and affirmed the conviction. The Supreme Court of Utah, in *Rudy vs. Railway Company*, 8 Utah, 165, in passing on the apposite question as to the right of a passenger to ride on a certain ticket discountenanced an instruction given by the trial court to the effect that plaintiff had certain rights if "he believed he had a right to ride in *good faith*." In passing on this question the court said at p. 169:

> "We think the right * * * was in no way affected by any *belief* he may have entertained as to his right to ride on his ticket."

This Court held in *Crosby vs. Buchanan* 23 Wall., 420, 458, that honesty of purpose between wrongdoers is immaterial. In *Gardner vs. N. H. & N. Co.*, 51 Conn., 143, it was held at p. 150:

> "The plaintiff paid no fare, and whether he intended to pay or not when called upon

is of no consequence, *so that his good or bad faith in taking his place on the car among the horses is quite immaterial.*"

We submit further that inasmuch as Schuyler was denied by the federal statute the right to a free ride on an interstate trip—of which law and denial he is presumed to have had knowledge—the conductor could not by mere acquiescence confer such a right on him.

Clark vs. C. & N. W. R. Co., 165 Fed., 408.
Purple vs. U. P. R. Co., 114 Fed., 123.
Condran vs. Ry. Co., 67 Fed., 522.
Grahn vs. International etc. R. Co., 100 Tex., 27,
McVeety vs. St. Paul, etc., R. Co., 45 Minn., 268.

The underlying principle of all the decisions is that where a person goes upon the conveyance of a common carrier with the intent to evade the payment of fare, or even at the invitation of an employe who is not authorized to give free transportation, or deceives the conductor as to his right to ride, or seeks to perpetrate a fraud on the carrier with the aid of its employes, there can be no recovery in the event of injury or death caused while

the person is in that relation to the carrier, because there is an absence of that essential contractual relation which is necessary to impose a legal obligation upon the carrier. Any other rule would permit a person thus engaged to obtain relief for an injury caused while he was wrongfully depriving another of his property, and would, contrary to the plainest dictates of justice, allow him to take advantage of his own wrong. Schuyler was in no better position than would be a person who by deceit or fraud, or by entering into a scheme with the employe of a jeweler, obtained a diamond for nothing, and subsequently discovered that it was spurious. In either case the injured party would be without a legal basis for a cause of action.

Schuyler was not an accepted gratuitous passenger. No contract to permit him to ride free was ever made between him and the carrier. All the circumstances of the trip negative such a theory. As in the case of an ordinary passenger, there must be a contract to create the relation, and there is no evidence in this case that the company ever consented to Schuyler's being carried gratuitously and in violation of the statute. But if, for the purpose of mere argument, we assume that the conductor had winked

at Schuyler's riding when he knew that the use of his official commission was a mere blind to obtain the free interstate ride prohibited by the statute, still this action could not prevail. It has long been positively decided by this Court that one suing another cannot recover damages growing out of a transaction which is *illegal* under a federal statute, because courts will not help either party to an arrangement prohibited by law to claim that rights accrued to him thereunder. In *Ewell vs. Daggs*, 108 U. S., 143, it is held that the law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land." Continuing, the Court said at p. 149:

> "And Lord MANSFIELD, in *Holman vs. Johnson*, Cowp., 341, stated the ground on which, in such cases, courts proceed. He said:
>
> 'The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex*

turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, *not for the sake of the defendant*, but because they will not lend their aid to such a plaintiff'.

"And the effect is the same, if the contract is in fact illegal, as made in violation of a statute, whether the statute declares it to be void or not. *Bank of United States v. Owens*, 2 Pet., 527. 'There can be no civil right,' said Mr. Justice JOHNSON, in that case, 'when there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.'"

This principle, and this quotation, were again announced and approved in—

Pullman's Car Co. vs. Transp. Co., 171 U. S., 138, 151.

To the same effect is—

Duncan vs. Maine Cent. R. Co., 113 Fed., 508,

where it is said that one attempting to obtain a free ride prohibited by a federal statute, is in *pari delicto* with the carrier attempting to grant him such a ride, and, as he is the "party especially enjoying the benefit of the combination in

violation of law," no right which he can enforce could grow "out of the joint tort or the subject matter of the agreement."

And the decision in this *Duncan case* (113 Fed., 508), does away with the distinction attempted to be made by the State Court to the effect that even though Schuyler's carriage was in violation of the Hepburn Act, and though in this view the parties were in *pari delicto*, still a recovery could be allowed independently of his legal right because the assumption might arise, so the court holds, out of the carrier's acceptance of him as a passenger. At page 509 the court disposes of this contention, as follows:

> "It is the undoubted law that the maxims with reference to persons in *pari delicto* are not limited to causes *ex contractu*, and that no suit can be maintained whenever it springs from an illegal transaction to which the plaintiff was a party, and which transaction is necessarily a portion of his case. * * * But the case takes on even a more concrete aspect. Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The conse-

> quence, therefore of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder and to place him outside of those rules of law which give protection against the mere negligence of the servants of a common carrier."

The decisions of this Court likewise furnish the answer to the State Court's other suggestion that,—" to permit the defense in such case is to allow the appellant to excuse itself or claim immunity from the consequences of its own tortious acts."

In the *Ewell case* (108 U. S., 143, 149) this Court approves the rule announced by Lord MANSFIELD that to refuse to permit such a plaintiff to recover is " not for the sake of the defendant, but because they [the courts] will not lend their aid to such a plaintiff."

The law involved here, and which Schuyler was violating, is a federal statute, and the decisions of the state courts on the rights of parties in *pari delicto* do not apply, but the rules of decision of this and the other federal courts govern. This was settled in *Central Transp. Co. vs. Pullman's Car Co.*, 139 U. S., 24, where, in answer to the suggestion that defendant could not set up this defense, it was held, at page 55 :

> "But this argument, *though sustained by decisions in some of the states*, finds no support in the judgments of this court."

(*c*) *The verdict of the jury and the judgment of the State Supreme Court are not supported by evidence and are contrary to law.*

We respectfully submit that this Court should set aside the judgment, first, because of the erroneous interpretation placed on the Hepburn Act by the lower court, and second, because the State Court exceeded its authority in reading into the anti-pass clause an exception in favor of "gratuitous" passengers not mentioned or intended by Congress.

But even if doubt should arise on either or both of these questions, we respectfully urge that the judgment should be reversed for the following reasons:

(1) In *Carter vs. Texas*, 177 U. S., 442, it was held, at page 447:

> "The question whether a right or privilege, claimed under the Constitution or laws of the United States, was *distinctly* and *sufficiently pleaded* * * * is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State."

Defendants in error here declared in their complaint and brought the railroad company into court to meet them on the single clean cut issue as to *whether or not Schuyler was being transported on the train as a mail clerk and in the discharge of his duties as such clerk* (Tr. 3). Plaintiff in error disproved this beyond question, as held by the State Supreme Court (See first opinion, Tr. 121–128—also opinion on rehearing, Tr. p. 130). It is a settled rule of pleading in all the courts throughout the land, that a complaint must proceed upon a distinct and definite theory—and upon that theory alone the case must stand or fall. In *Waterbury vs. R. R. Co.*, 17 Fed., 671, plaintiff was a drover, accompanying a shipment of cattle. He was injured while riding on the engine. He sued on the theory that he was a passenger, riding on the engine with the knowledge and consent of the enginemen, but the theory he adopted at the trial, and on which he produced proof, and on which the court instructed the jury, was that he was on the engine under "an implied condition of the contract to carry his cattle." On this last theory the jury found in his favor, but the court granted a new trial, holding that the case on which he had been

allowed a recovery was not the one he had sued on. At page 673 the court said:

> "The real question in the case was lost sight of upon the trial. That question was whether the plaintiff was being carried upon the engine with the consent of the defendant, or only by the unauthorized permission or invitation of the defendant's employes. This question was not presented by the exceptions to the charge or by the instructions which the court was asked to give to the jury. But upon the theory on which the case was presented the jury must have found that the plaintiff had a right to be carried by the defendant as an implied condition of the contract for the transportation of his cattle. As the evidence does not warrant such a conclusion, and as the real question in the case has not been passed upon by the jury, there should be a new trial upon the ground of misdirection, although the defendant's exceptions do not reach the error."

Plaintiff in error was denied a fair trial when the State Supreme Court stepped aside and affirmed the judgment on a theory on which plaintiff in error was never afforded an opportunity to present evidence; a theory, too, which was not presented in the pleadings nor sub-

mitted to the trial court nor passed on by the jury. Allowing a recovery in these circumstances under the Hepburn Act, or, more properly, despite the provisions of that Federal statute, was taking snap judgment against plaintiff in error. This amounted to a denial of that due process of law guaranteed by the Federal Constitution, and violated Section 9 of Article VIII of the Constitution of Utah, which provides: "The appeal shall be upon the record made in the court below."

At no stage in the proceedings did plaintiff in error ever waive its constitutional right (*Baylis vs. Travelers' Ins. Co.*, 113 U. S., 316, 320–1) to have this question decided by a jury, if it really is a question in the case.

(2) The jury did not find the verdict on either theory on which the Supreme Court affirms it. On the contrary the verdict was arrived at under the influence of *erroneous instruction* No. 2 (Tr., 25, Tenth Assignment of Error, Tr., 149) given by the trial court, in which the jury was told (*a*) to indulge the *presumption* that Schuyler was *rightfully* on the train and *on duty*; (*b*) that the burden was on the company to show the contrary by affirmative proof and "by a preponderance of all the evidence"; (*c*) that the burden was on the

defendant to "overcome" that assumption by affirmative proof and by a preponderance of all the evidence, and (*d*) that such presumption could only be overcome by "convincing" the jury to the contrary.

In *Domenico vs. E. P. E. Ry. Co.*, 90 S. W., 60, the correct rule is thus stated:

> "The burden was upon plaintiff to make out his case by a *preponderance* of evidence. * * * It was incumbent *upon appellant to prove* that he was a *passenger* upon one of appellee's cars before he could travel any further with his case."

Inasmuch as the Supreme Court held that the evidence conclusively showed that deceased was *not on duty*, and correctly held this instruction was so grossly erroneous as to nullify the verdict rendered under it (First opinion, Tr., 127), it follows, we submit, that the verdict cannot be affirmed on the theory that Schuyler was an accepted gratuitous passenger, for the reason that that question was never submitted to or passed on by the jury.

C. B. & Q. R. R. Co. vs. Mehlsack
131 Ill., 61.

(3) Even if this Court should hold that under the Hepburn Act plaintiff in error *might*

lawfully have granted Schuyler *free* transportation, or *could* have accepted him as a "gratuitous" passenger, on the interstate trip in question taken for purely *personal business*, still we respectfully submit *defendants in error must fail*, and this Court should reverse the judgment because they did not prove and the jury did not find that plaintiff in error did in fact in this instance extend that privilege to him. The railroad company was under no *duty* to permit Schuyler to ride free. He did not have a *right* to *insist* on the railroad company carrying him free. In its answer the company flatly denied that Schuyler made this *personal* trip on its car with its consent. It expressly averred that *he was in the car without any right "or permission of defendant, or by any right whatever."* This denial cast on the defendants in error the onus of proving by a preponderance that permission and consent had in fact been given, and the verdict must fall because the record shows affirmatively that they did not meet this burden. In *Illinois Central Ry. Co. vs. Dunnigan*, 95 Miss., 749, it was held:

> "The only *duty* which appellant owed to appellee was to furnish him with transportation over its lines at the same rate and under

the same conditions that it furnished same to the general public. Permitting a minister of the gospel, or *any* person, to travel at a rate lower than that given the general public is a mere gratuity, *which appellant can withhold at its pleasure, and even a custom so to do imposed upon it no obligation to give such permission.*"

The burden is on the one claiming the rights of a passenger to prove that in fact he is entitled to such rights. This rule, and the error in instruction No. 2 which vitiates the verdict in this case, is well illustrated in *Central of Georgia R. Co. vs. Cannon*, 106 Ga., 828, where it is held at p. 831:

"The most important issue at the trial was whether or not the plaintiff was *rightfully* upon the car of the defendant company as a passenger. The court charged, without qualification or explanation, that the burden of proof was upon the defendant to show that, if the plaintiff was ejected from the car, he was lawfully expelled. Upon the assumption that the plaintiff was entitled to ride upon the defendant's train, this instruction would have been correct; but it being a seriously contested issue whether or not he was so entitled, the instruction should have been quali-

> fied by a statement to the effect that the burden referred to would rest upon the company only in the event the evidence satisfied the jury that the plaintiff had a *legal right* to enter and take passage upon this train. Certainly, until this appeared, the company was not bound to show that he was properly ejected."

(4) To entitle plaintiff in error to a reversal here it is not necessary to contend that this Court should find as matter of law that there was any act of fraudulent misrepresentation or concealment on the part of Schuyler; it is sufficient to urge that that is a question which should have been, but was not, submitted to the jury. The judgment is affirmed by the State Court on the erroneous *assumption* that there is *evidence* in the record showing, and that the *jury* had *found*, that the conductor had knowledge that Schuyler was seeking to obtain a free ride, whereas there is no such evidence in the record, and plaintiff in error has not been afforded the opportunity of having a jury pass on this question.

In paragraph 2 of syllabus to *Hoskins vs. N. P. Ry. Co.*, 39 Mont. 394 (a parallel case—where a mail clerk sued for injuries sustained in a derailment), the rule is thus succinctly stated:

"In an action * * * by a railway postal clerk for injuries sustained while off duty * * * the burden was on him to prove that he was a passenger and it was incumbent on him to show, either that defendant was under a specific contractual or statutory obligation to the government to carry him in the mail car where he was at the time, or that defendant recognized a request for transportation when he was off duty."

THIRD POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
P. L. WILLIAMS,
E. M. BAGLEY,
Of Counsel for Plaintiff in Error.

DEC 16 1912
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 143.

SOUTHERN PACIFIC COMPANY, *Plaintiff in Error,*

vs.

MARY R. SCHUYLER AND RHEA SCHUYLER, EDWARD SCHUYLER, VERA SCHUYLER, AND DOROTHY SCHUYLER, INFANTS, BY JOHN M. FORRISTALL, THEIR GUARDIAN AD LITEM, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR DEFENDANTS IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR DEFENDANTS IN ERROR.

A review of the judgment of the Supreme Court of the State of Utah is sought in this case, on two grounds (1) that that Court erred in affirming the decision of the Second Judicial District Court of the State denying the petition of the Plaintiff in Error for the removal of the cause to the Circuit Court of the United State, and (2) on the ground that the Plaintiff in Error set up in its answer that the deceased Charles Albert Schuyler, to recover damages

for whose death, the action was brought, was at the time of his injury, riding on one of its trains in violation of the anti-pass clause of what is commonly known as the Hepburn Act, it being contended that on the trial it became necessary to give a construction to this provision of a law of Congress and that the construction placed upon that act by the Supreme Court of the State was adverse to the Plaintiff in Error.

The Defendants in Error contend that the record shows that this Court has no jurisdiction for the reason that no Federal question is involved and this is the first question to be determnied.

Mansfield, C. L. & M. R. Co. v. Swan, 111 U. S., 379; 28 L. Ed., 462.
Fore River Shipbuilding Co. v. Hagg, 219 U. S., 175; 55 L. Ed., 163.

We will discuss these questions in the order here named.

I.

The first of these grounds, we think, is so entirely devoid of merit that it may properly be termed frivolous. In order to entitle the Plaintiff in Error to a removal of the cause from the State Court to the Circuit Court of the United States, it must have appeared clearly and unmistakably from the complaint that the cause of controversy, *necessarily*, in its determination, involved a Federal question. The Federal question must be certainly and directly and not merely incidentally involved.

I Rose's Code of Fed. Proc., 133.
Blackburn v. Mining Co., 175 U. S., 571; 44 L. Ed., 276.

Gableman v. Peoria, etc., Co., 179 U. S., 335; 45 L. Ed., 220.
Kansas Endowment Ass'n v. Kansas, 120 U. S., 103; 30 L. Ed., 593.
Bolling v. Lersner, 91 U. S., 594; 23 L. Ed., 366.
For a case directly in point, see Price v. Pa. R. Co., 113 U. S., 218; 28 L. Ed., 980.
Martin v. R. Co., 203 U. S., 284; 51 L. Ed., 184.

In a suit charging invalidity of a land patent issued by the Government of the United States, on the ground that it was obtained by fraud. The question presented is one of fact and does not raise a Federal question (Holland v. Hyde, 41 Fed., 897), and the question of whether a mining claim has been abandoned is a question of fact and does not involve a Federal question (Mining Co. v. Kinney, 46 Fed., 842). Whether a certain mine is a vein, lode or ledge, within the meaning of the statutes, is a question of fact and involves no Federal question.

Mining Co. v. Largey, 49 Fed., 289.

The complaint alleges that the deceased was employed as a clerk in the Railway Mail Service of the United States, and was, at the time of receiving the injuries from which he died, engaged in the performance of his duties as such clerk in a railway mail car in one of the trains of Plaintiff in Error, and that the Plaintiff in Error received compensation for his transportation from the Government of the United States and had undertaken to transport him from Oakland, California, to Ogden, Utah. Then follows allegations of negligence on the part of the Plaintiff in Error resulting in the derailment of the train and the consequent death of the deceased. Taken as true these facts

show that the deceased was a passenger for hire on the train of Plaintiff in Error and that his death resulted from negligence of the Plaintiff in Error.

It would doubtless have been sufficient, in order to show the relation of the deceased to the Plaintiff in Error and that he was a passenger, to have alleged that he boarded the train as such at Oakland, California, and that the Plaintiff in Error undertook to transport him to Ogden, Utah. It was really unnecessary to allege the particulars relied on to show that he was a passenger, and the allegations as to his being employed as a clerk in the Railway Mail Service and on duty and that the Plaintiff in Error received compensation for his transportation, were unnecessary and may therefore be treated as surplusage.

In order to give a Circuit Court of the United States jurisdiction on the ground that a Federal question is involved, the Federal question must appear from the necessary allegations in the initial pleading, and if this does not appear the want cannot be supplied by any statement in the petition for removal, or in any subsequent pleadings.

> Gableman v. Peoria D. & E. R. Co., 179 U. S., 335; 45 L. Ed., 220.

It is entirely clear that the complaint in this case did not disclose any Federal question. It merely shows that the deceased, while being transported as a passenger by the Plaintiff in Error, met death through the negligence of the carrier. The case, therefore, is not one arising under any law of the United States, but under the law of the State of Utah, giving a right of action for death by wrongful act or neglect. Without such a law in the State of Utah, where the injuries and death occurred, it is well settled that no action could be maintained.

Although a claim of a Federal question has been plainly made in the State Court, yet if it clearly appears that the claim lacked color of merit and had no substance or foundation, the fact that it was raised will not afford sufficient ground for a writ of error.

New Orleans Water Works Co. v. Louisiana, 185 U. S., 336; 46 L. Ed., 936.
Millinger v. Hartupee, 6 Wall., 25; 18 L. Ed., 829.
New Orleans v. New Orleans Water Works Co., 142 U. S., 79; 35 L. Ed., 943.
Hamblin v. Western Land Co., 147 U. S., 531; 37 L. Ed., 267.
St. Joseph, etc., R. Co. v. Steele, 167 U. S., 659; 42 L. Ed., 315.
Wilson v. North Carolina, 169 U. S., 586; 42 L. Ed., 865.

There must be at least color of ground for a Federal question, otherwise a Federal question might be set up in almost any case.

New Orleans v. New Orleans Water Works Co., 142 U. S., 79; 35 L. Ed., 943.

If the complaint in this case can be made the basis for removal of the cause to the Circuit Court of the United States, it would be difficult to conceive of a case where an officer or employee of the Government is a party that could not be removed.

It is apparent that if any Federal question was presented in the trial Court, it was first presented by the answer, and, of course, that furnished no ground for removal.

II.

It is doubtful, however, if the answer presents any Federal question. It is true that the answer alleges that deceased entered a mail car in one of the trains of the Plaintiff in Error, in violation of the Statutes of the United States, but it is also averred that he entered the car without the knowledge or consent of plaintiff in Error. If deceased entered the car clandestinely and was there without the consent or the knowledge of Plaintiff in Error, he was a trespasser, and, regardless of any law of the United States, no recovery could be had and therefore no Federal question was necessarily involved. In other words, the Defendants in Error alleged in their complaint that deceased was on the train with the knowledge and consent of Plaintiff in Error and that Plaintiff in Error had undertaken to transport him as a passenger. Plaintiff in Error, in its answer, denied this and alleged, in effect, that he entered the car clandestinely and fraudulently and that he was there without its consent or knowledge. The issue, therefore, as to the status of the deceased, whether a passenger or a trespasser, was purely one of fact and involved the construction of no law of the United States.

On the trial, however, the Court erroneously instructed the jury that if the deceased was not on duty, "but traveling solely for his own purposes, unconnected with any official duties, he would not be a passenger, but on the contrary a trespasser to whom the carrier would not be liable for any such negligence as that with which the defendant herein is charged."

Under this instruction, the jury, in returning a verdict for the plaintiff, must have found that the deceased was on duty at the time of his injury and by this instruction the Plaintiff in Error was given the full benefit of the construction placed on the law in question by the Plaintiff in Error. In other words, the trial Court held, as contended by the Plain-

tiff in Error, that the Hepburn Act made is unlawful, in fact, a criminal offense, for a clerk in a Railway Mail Service to accept free transportation from a railroad doing an inter-state business, when not on duty. The decision of the Federal question which arose during the trial was therefore decided by the trial Court in favor of the Plaintiff in Error.

But if resort be had to the opinion of the Supreme Court of the State of Utah, to ascertain what questions were decided by that Court, and if such opinion discloses that that Court construed the Act in question contrary to the contention of Plaintiff in Error, then we call attention to the fact that the State Supreme Court found, as a matter of fact, that while the evidence did not support the allegation of the complaint that deceased was on duty at the time of his injuries, the proofs and the stipulation of the parties made during the trial show conclusively that deceased was on the train with the knowledge and consent of the Plaintiff in Error, in good faith, and that he and the Plaintiff in Error both believed that he was entitled to free transportation, though not on duty, and that the Plaintiff in Error in giving, and the deceased in accepting, free transportation, acted in good faith, and, further, that the undisputed evidence sustained the allegations of negligence on the part of the Plaintiff in Error. (Tr. 133, 134 and 141.) This Court will not review these findings of fact by the State Supreme Court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86; 53 L. Ed. 417;

Egan v. Hart, 165 U. S. 188; 41 L. Ed. 680;

Clipper Mining Co. v. Eli Mining & Land Co., *et al.*, 194 U. S. 220; 48 L. Ed. 944.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281; 54 L. Ed. 1042.

Rankin v. Emigh, 218 U. S. 27; 54 L. Ed. 915.

It was held by the State Supreme Court that while the complaint alleged that the deceased was a passenger for hire, and the proofs and the stipulations of the parties made during the trial show conclusively that he was not a passenger for hire but was being transported as a passenger gratuitously, this was not, under the Statute of Utah, such a variance as would defeat recovery. (Tr. 131 and 132.) This ruling of the Supreme Court on the question of practice under the Utah code is not reviewable in this Court.

> Texas & Nor. Co. v. Miller, 221 U. S. 408; 55 L. Ed. 789.
> National Foundry & Pipe Works v. O'Conto Water Supply Co., 183 U. S. 216; 46 L. Ed. 157.

The Supreme Court of Utah, in its opinion, after construing the provisions of the Hepburn Act in question, says (Tr. 137):

> "Though the construction we have given to the Hepburn Act should not be correct and though it was unlawful for the appellant to give and the deecased to receive free transportation on his Commission when he was not on duty, yet we are also of the opinion that under all the circumstances of the case the appellant having undertaken and assumed to carry and transport the deceased as a passenger by reason of the Commission, cannot escape liability for the consequences of its negligence on that ground."

This ruling involved a question of general law, and not any Federal question.

It will thus be seen that the Supreme Court of Utah affirmed the judgment of the trial Court upon grounds entirely distinct from any question of the proper construction to be placed on the Hepburn Act.

It is well settled that, though one of the points decided in the Supreme Court of a State would be sufficient ground to confer jurisdiction on this Court, yet if the judgment is based on another and distinct and sufficient ground over which this Court has no jurisdiction, such judgment is not reviewable in this Court.

Rector v. Ashby, 73 U. S. 142; 18 L. Ed. 733.
Corbett v. Craven, 215 U. S. 125; 54 L. Ed. 122.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 122; 53 L. Ed. 431.

This distinct ground upon which the Supreme Court of Utah based its judgment affirming the judgment of the trial Court is, in and of itself, amply sufficient to sustain the judgment.

Moore, in his work on Carriers, page 570, says: "A person who travels upon a pass unlawfully issued to him, in violation of the law prohibiting the issuing of free passes, is not a trespasser but is entitled to the rights of a passenger." This doctrine is supported by numerous text writers and adjudicated cases.

5 Am. & Eng. Ency., Law (2 Ed.) 508;
Fetter on Carriers, Section 220;
Wharton's Law Neg., Sections 354 and 355;
Bradburn v. Whatcom, etc. Ry. Co., 45 Wash., 583; 88 Pac. 1020;
Buffalo etc. R. Co. v. O'Hara (Pa.), 9 Am. & Eng. Ry Cases 317;
McNiell v. Durham & C. R. Co., 135 N. C. 682;
Delaware L. & W. R. Co. v. Trautwein, 52 N. J. L. 169; 7 L. R. A. 435;
Carrol v. Staten Island R. Co., 158 N. Y. 126;

Sutton v. Town of Wauwatosa, 29 Wis. 21;
Opsahl v. Judd, 13 Minn. 139; 14 N. W. 575;
Chicago v. Keefe, 114 Ill. 222; 2 N. E. 267;
McClain v. Racing Ass'n. (Ida.), 104 Pac. 115;
Mahoney v. Cook, 26 Pa. St. 324;
Florida etc. R. Co. v. Sullivan, 61 L. R. A. 410.

This precise question, moreover, has been decided by this Court adversely to the contention of Plaintiff in Error.

Philadelphia etc. Co. v. Towboat Co., 23 How. 209; 16 L. Ed. 433.
Bucher v. Cheshire R. Co., 125 U. S. 555; 31 L. Ed. 795.

For the foregoing reasons we respectfully submit that the writ in this case should be dismissed or the judgment of the Supreme Court of Utah affirmed.

But, considered on its merits, the contention of the Plaintiff in Error that the Hepburn Act makes it unlawful for a railroad company to give or a Railway Mail Service employee to receive free transportation when not on duty, is untenable. Section 1, par. 4 of this act provides as follows:

"No common carrier subject to the provisions of this Act, shall after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians, attorneys-at-law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indig-

ent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies, to railway mail service employes, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending upon such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for such offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any persons, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

In discussing this provision of the law, we cannot do better than adopt the language of Chief Justice Straup of the Supreme Court of Utah, as follows:

"Before the passage of this act, it, of course, was lawful for a carrier to give free interstate transportation for passengers; and while there is no direct evi-

dence of it in the case, we think, from what was made to appear in argument, we may assume that before this act took effect commissions to Railway Mail Service employes were honored by carriers on the lines designated thereon, and such employes given the facilities of free transportation, whether on duty or not. And upon the record, we think we are justified in assuming that after the act took effect, and at the time of the transportation in question, the appellant and the deceased, in good faith, believed that the provisions of the Hepburn Act did not forbid a carrier from transporting a Railway Mail Service employe on his commission issued to him, and over the lines designated thereon, though he was not on duty. This assumption, of course, is wholly immaterial to the construction of the act, but it it important as bearing on the question whether the deceased was riding on the mail car with appellant's consent or against his will. In June, 1907, about five months after the derailment, in response to an inquiry made of them, the members of the Interstate Commerce Commission expressed their views that under the Hepburn Act a carrier who knowingly permitted Railway Mail Service employes to use, and that such employes who accepted, free transportation when not in the discharge of their public duties, and when traveling unofficially, and for their personal benefit or pleasure, would subject themselves to the penalties of that act. This conclusion was reached upon a classification of the persons enumerated in the exceptions of the act, and who might receive free transportation, into three groups: (1) The 'persons actively connected with the operation of railroads, or with the administration in various capacities of their affairs;' (2) the 'persons who are either engaged in administering charities or are the object of charitable aid,' and (3) persons 'who have to do with the affairs of persons, firms, or corporations engaged in business along the line of railroads * * * and not in the employ of the railway companies.' To those classified in the first and second groups, it is held by them, free interstate trans-

portation may be given without offending the provisions of the act, though the transportation is wholly for their personal pleasure and benefit; but to those classified in the third group, free interstate transportation cannot lawfully be given to or received by them 'except in connection with the actual performance of duties, or on the return journey.' Had this ruling been made as the result of some hearing or proceeding before the commission involving the question, we might be inclined, though not required, to accept such a construction, even though it was not in accord with our own views. However, since it was a mere response in reply to a letter seeking the views of the members of the commission, apparently not upon an actual but a moot case, the ruling ought not be given the weight that otherwise should be given it had it been made under other circumstances. Notwithstanding the high regard entertained by us for the judgment of the members of the commission, we, nevertheless, are of the opinion that the construction placed by them on the Hepburn Act in this regard is not the correct one. Congress, of course, could except any persons it desired from the operation of the general provisions of the act forbidding the giving of free interstate transportation for passengers. It made such exceptions. It is generally recognized that an exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made. Tested by this principle, had the exception in respect of Railway Mail Service employes not been made, would the carriage of such employes on mail cars in the discharge of duties pertaining to the Railway Mail Service be in violation of the general provision of the act? We think not. It is generally held by the courts that 'a mail agent or postal clerk employed and engaged in the service of the government and traveling in the postal or mail car, in charge of the mails, under a contract between the government and the carrier for the carriage of mail and the mail

clerks having lawful custody thereof, is a passenger for hire to whom the carrier owes the same duty that it does to passengers riding upon the train, in so far as its liability for personal injuries arising from its negligence is concerned; the compensation for the carriage of such agents or clerks must be regarded as included in that paid by the government for the carriage of mails.' Moore on Carriers, p. 577.) Such carriage under such circumstances, in no sense would be free transportation, but transportation for hire, paid for by the government. We cannot believe it was thought by Congress that if the exception relating to Railway Mail Service employes was not made, the carriage of such persons in charge of the mails, in mail cars, or engaged in duties pertaining to the Railway Mail Service, under a contract between the government and the carrier for the carriage of mails and mail clerks, would, in any sense, be free transportation within the general words and in violation of the general provision of the act forbidding free interstate transportation. We think it manifest that something more and other than that was intended by such exception.

"In the act is contained a number of exceptions. Some are without limitation or restriction; others are limited and restricted. Thus: 'Necessary caretakers of livestock,' etc.; 'employes on sleeping cars'; 'newsboys on trains'; and other exceptions specified in the act, have in themselves restrictive or qualifying terms. But in the exception 'its (the carrier's) employes and their families, its officers, agents,' etc., 'ministers of religion,' indigent persons, inmates of national or state homes, etc., are without terms of restriction or limitation. So is the exception as to 'Railway Mail Service employes, postoffice inspectors, customs inspectors, and immigration inspectors.' We see no more license to read into this exception words of restriction, or limitation than into the first, second, third, or fourth exceptions specified in the act. Because such words are more easily read into this exception than into the second, third, or fourth, is no reason why they should be read into it. They can as readily be read into the first as

into this exception. That is, the words 'when on duty' can as readily be read into the exception pertaining to the carrier's employes as in the exception pertaining to Railway Mail Service employes. The fact that the exception pertaining to 'the employes on sleeping cars, express cars,' is restricted and limited, and that the exception to 'Railway Mail Service employes' is not restricted or limited, is, we think, significant, as bearing upon the intention that the former was intended to be restricted and the latter was not. If Congress intended the limitation or restriction to apply to both, such an intention could very easily have been expressed. We can see good reason why it was desired to restrict the one and not the other. We need not, however, speculate on that, for the intention to restrict the one and not the other, is, we think, made manifest by the language employed. Furthermore, exceptions, in penal statutes ought to be liberally construed in favor of him who is charged with the violation of the provisions of the statute. We are therefore of the opinion that the Hepburn Act does not forbid a carrier from giving Railway Mail Service employes free interstate transportation when not on duty and when traveling for their own benefit or pleasure."

No Federal question is necessarily involved in the determination of this cause.

The answer of Plaintiff in Error alleges (Tr., 15), that the deceased "*without the knowledge* * * * *of this defendant,* * * * and for the purpose of avoiding the payment of fare, undertook to, and did wrongfully enter into and remain upon the train and cars of this defendant * * * and without its *knowledge* and consent. * * * secured his transportation," etc.

Under these allegations, irrespective of any law of the United States, the deceased would be a trespasser and no recovery could be had, hence the proper construction of the Hepburn Act, is wholly immaterial so far as the defense thus pleaded is concerned.

It is now insisted for the first time, however, that the deceased, though on the train in question with the knowledge of the carrier, had obtained permission to ride through deception and fraud. This is diametrically opposed to the position assumed by the Plaintiff in Error in its answer and upon the trial. As we have shown, in its answer it was alleged that the deceased was on the train without the knowledge of the Plaintiff in Error. On the trial, it was admitted that he was there with its knowledge, and that he had used the request for free transportation, contained in his commission to obtain transportation, but it was contended (Tr., 48, 131), "that under the Hepburn Act, neither the com-

pany nor its agents in charge of its train could lawfully permit the deceased to ride on his commission when not on duty, and that in so riding he was engaged in the commission of an unlawful act and therefore was a trespasser, and that for that reason no recovery could be had.

There was neither allegation nor attempted proof of misrepresentation, concealment, deception or fraud, but if the contention of the Plaintiff in Error now for the first time advanced (Brief, 23), that deceased secured his transportation through misrepresentation and fraud, conclusively appeared from the record, this, both at common law, and under the statutes of Utah (Comp. Laws, 1907, Sec. 4341) would constitute a complete defense, and being purely a question of fact, would not call for a construction of any law of the United States.

And so, too, if we concede that the Plaintiff in Error in extending and the deceased in accepting free transportation, acted in violation of the Hepburn Act and was therefore guilty of a public offense, this would constitute no defense to the action, and hence it was unnecessary to the determination of the cause that the Court should construe the Hepburn Act or any other law of the United States.

Moore on Carriers, 568-570;
5 A. & E. Ency. Law, 2 Ed., p. 508;
Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L., 169; 7 L. R. A., 435;
Bradburn v. Whatcomb Co. Ry. & L. Co., 45 Wash., 583; 88 Pac., 1020.
Buffalo, etc., R. Co. v. O'Hara, 9 A. & E. R. Cas., 317;
McNeill v. Durham & C. R. Co., 135 N. C., 682;
Fetter on Carriers of Passengers, 220;
City of Chicago v. Keefe, 114 Ill., 222;
Sutton v. Town of Wauwatosa, 29 Wis., 21;
Beach on Cont. Neg. (2 ed.), 175.

The claim that the deceased, as alleged in the answer, was on the train without the knowledge of the Plaintiff in Error and therefore was a trespasser; and the claim now urged in the brief of Plaintiff in Error, that the deceased obtained permission to ride by deception and fraud, present questions purely of fact, and as defenses to this action are in no way effected by the construction of the Hepburn Act. They would be just as effective, if pleaded and proved, under the construction given the Hepburn Act, by the Supreme Court of the State of Utah, as they would be had the Court adopted the contention of Plaintiff in Error as to the proper construction of that act.

"It is well settled that where the Supreme Court of a State decides a federal question in rendering judgment, and also decides against the Plaintiff in Error upon an independ-

ent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hammond v. Johnston, 142 U. S., 73; 35 L. Ed., 941;
Rogers v. Jones, 214 U. S., 196; 53 L. Ed., 965;
Delaware, etc., Co. v. Reybold, 142 U. S., 643; 35 L. Ed., 1141.

The Supreme Court of the State of Utah (Tr., 131, 132) held: that the complaint in this case, although alleging particular facts to show that the deceased was a passenger for hire, was sufficient to permit proof that he was a gratuitous passenger and that there was no material variance between the pleading and the proof; that upon the stipulation of the parties at the trial and the whole record, "the only permissible inferences are, that the deceased, both in going to and returning from Oakland, rode in the mail car with the knowledge and consent of Appellant's conductor in charge of the train; that Appellant, its conductor and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to ride and be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and recognized by them, and as the evidence of his right to transportation"; that there was no evidence that the deceased entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose; that *"the evidence, quite conclusively, shows the contrary"* (Tr., 133, 134).

The cases cited in the brief of Plaintiff in Error in support of its contention that deceased was a trespasser, are cases in which the alleged passenger had obtained transportation by active fraud and are therefore not applicable.

The Court then, after construing the anti-pass clause of the Hepburn Act, says: "Though the construction we have given the Hepburn Act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation, on his commission, when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant having undertaken and assumed to carry and transport the deceased as a passenger by reason of his commission, cannot escape liability for the consequences of its negligence on that ground."

The decision of the State Supreme Court, that under the Code of Civil Procedure of the State of Utah, the complaint was sufficient to support the judgment and that there was no material variance between the pleadings and the proof on the part of Defendants in Error, is not reviewable in this Court.

Stryker v. Crane, 133 U. S., 527; 31 L. Ed., 194;
Bucher v. Cheshire R. Co., 125 U. S., 555; 31 L. Ed., 795;
Morley v. Lake Shore & M. S. R. Co., 142 U. S., 162; 36 L. Ed., 925;
Standard Oil Co. v. Missouri, 224 U. S., 270; 56 L. Ed., 760;
Bacon v. Texas, 163 U. S., 207; 41 L. Ed., 132;
Turner v. Wilkes Co. Comrs., 173 U. S., 463; 43 L. Ed., 768;
1 Rose's Code Fed. Proc., Sec. 10, p. 98; Sec. 12, p. 110.

The findings and judgment of a State Court on questions of fact, are final and conclusive on this court.

2 Rose's Code Fed. Proc., Sec. 284, p. 1626;
Brinkmeier v. Missouri P. R. Co., 224 U. S., 268; 56 L. Ed., 758;
Eau Claire Nat. Bank v. Jackman, 204 U. S., 522; 51 L. Ed., 596.

If the State Supreme Court, having decided that the complaint was sufficient to permit proof that deceased was a gratuitous passenger; that there was no material variance between the allegations of the complaint and the proofs; that the stipulations and the proofs established conclusively that the deceased was guilty of no wrongful or fraudulent conduct, and that Plaintiff in Error, its agents and deceased acted in good faith, believing that the commission of the deceased entitled him to free transportation, and that he had in fact been accepted as a passenger; and furthet that even if both parties had been acting in violation of the provisions of the Hepburn Act, the Defendants in Error, upon the uncontradicted facts were entitled to recover, had then declined to construe the Hepburn Act, we think no one would contend that its decision on these grounds, which are clearly non-federal, would be reviewable in this Court.

If the Supreme Court had sustained the contention of Plaintiff in Error that, the Hepburn Act makes it unlawful for a railroad company to give any free interstate transportation to a railway mail service employe when not on duty, the result would not have been different for the Court holds that though both parties may have been acting in violation of this federal law, that would not relieve the Plaintiff in Error of the consequences of its negligence. It follows that there are sufficient grounds on which to sustain the judgment, independent of the question of the proper construction of the Hepburn Act, and that this Court has no jurisdiction to review the judgment of the State Court.

The decision of the Supreme Court of Utah, that even if the deceased in accepting free transportation, was viola-

ting the anti-pass provisions of the Hepburn Act, this would not constitute a defense to this action, is in full accord with the decisions of this Court.

Bucher v. Cheshire R. Co., 125 U. S., 555; 31 L. Ed., 795;
Philadelphia, etc., Co. v. Steam Towboat Co., 64 U. S., 209; 16 L. Ed., 433.

Viewed from any angle we submit that no federal question is necessarily involved in this case and that the writ of error should be dismissed.

Considered, however, on its merits the construction given to the Hepburn Act by the State Supreme Court is clearly right.

There is no such thing as free transportation of a railway mail clerk while on duty. We cannot do better in discussing this question than refer to the opinion of the Supreme Court of Utah.

See *infra*, pp. 11, 12, 13, 14, 15.

It does not seem to be seriously contended that the construction placed upon the Hepburn Act by the Supreme Court of Utah is incorrect, but it is insisted that because the Interstate Commerce Commission, in response to a letter of inquiry, and without any hearing expressed the opinion that this act prohibited the free transportation of railway mail service employes when not on duty, the question is foreclosed and not open for consideration by the Courts.

This is certainly a startling proposition. The cases cited in its support, do not justify this contention. The so-called decision of the Interstate Commerce Commission, was not the result of a hearing or proceeding before the Commission, but is contained in a letter written by Commissioner Harlan, and merely submitted to his colleagues, in response to an *ex parte* inquiry. This construction has not *"long obtained in* practical executions," but is *"plainly erroneous."*

It is only where a statute has *"received long continued executive construction"* and where its meaning is doubtful, and therefore, not *"plainly erroneous,"* that the courts feel impelled to accept such construction.

We respectfully submit that from any view of the case, it is apparent that there is no merit whatever in the contentions of the Plaintiff in Error, and that the writ of error was sued out in this case not in good faith but for delay merely, and that the judgment ought to be affirmed with damages to the Defendants in Error.

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SOUTHERN PACIFIC COMPANY *v.* SCHUYLER.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 143. Argued January 23, 1913.—Decided February 24, 1913.

Whether the anti-pass provision of the Hepburn Act prohibits a carrier from giving free interstate transportation to employés of the Railway Mail Service when not on duty but traveling for their own benefit, is a Federal question.

One holding a government commission that entitles him to free interstate railway transportation while on duty and who while not on duty enters a train, relying on such commission and with the consent of the officials in charge of the train, and remains thereon with their consent, is not a trespasser even if in so doing he violates the anti-pass provision of the Hepburn law.

Whether the relation of carrier and passenger arises in the case of one traveling gratuitously in violation of the anti-pass provision of the Hepburn Act, in the absence of any Federal statute regulating the matter, is a question not of Federal, but of state, law.

Where the decision of the state court adverse to plaintiff in error proceeds upon two independent grounds, one of which does not involve a Federal question and is sufficient to support it, the writ of error will be dismissed or the judgment affirmed according to circumstances.

On writ of error to a state court, while this court does not ordinarily review findings of fact, if a Federal right has been denied as the result of a finding of fact which is without support in the evidence,

this court may examine the evidence to the extent necessary to give plaintiff in error the benefit of the Federal right asserted.

In this case the finding of the state court that a railway mail clerk while traveling on his own business was a gratuitous passenger was well founded on the evidence.

There is no presumption that a railway company gives free interstate transportation, and that is a fact that must be established by evidence.

The anti-pass provision of the Hepburn Act does not make an outlaw of one traveling interstate on a pass and so deprive him of the benefit of the local law that makes the carrier responsible for exercising due care.

Penalties are not to be enlarged by construction; and so *held* that one violating the Hepburn Act by accepting gratuitous passage is not deprived of protection due to other passengers under the local law as well as subject to the penalty specified in the act.

In Utah the rights of safe carriage on a common carrier are not derived from the contract of carriage but are based on the law of the State requiring the carrier to use due care for the safety of passengers.

37 Utah, 581, affirmed.

THE facts, which involve the liability of an interstate railway carrier for personal injuries sustained through its negligence by a railway mail service clerk traveling without payment of fare, and the construction of the anti-pass provisions of the Hepburn Act, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. P. L. Williams* and *Mr. E. M. Bagley* were on the brief, for plaintiff in error:

Railway mail service employés are prohibited by the anti-pass clause of the Interstate Commerce Act from using their official commissions to obtain free interstate rides when off duty or when not in the discharge of their public duties. *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467. Interstate Commerce Law, § 1, par. 4, 34 Stat., p. 584.

The Interstate Commerce Commission has ruled that employés in the mail service are not entitled to free transportation when not on duty. Sen. Doc. No. 226, p. 26,

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1st sess., 60th Cong. Congress has impliedly sanctioned this interpretation of the act. See 35 Stat. 60; *United States* v. *Wells-Fargo Express Co.*, 161 Fed. Rep. 607; 36 Stat. 546; *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 401; *United States* v. *Hermanos*, 209 U. S. 337.

It was the purpose of the Anti-Pass Act that all citizens should under the same circumstance be treated alike. *C. I. & L. R. Ry. Co.* v. *United States*, 219 U. S. 486; *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 392. To have granted Schuyler, or for him to have used, free interstate transportation would constitute just such discrimination as the statute was designed to abolish.

Schuyler's commission was in fact really nothing more than the certificate or credentials issued by the Government certifying to his appointment and authority. See *Ill. Cent. Ry. Co.* v. *Dunnigan*, 95 Mississippi, 749, to effect that railroads are not compelled to grant free transportation to any of the excepted classes named in the act. Even if it had previously been accepted or regarded as entitling the holder to free rides when off duty, the commission became null and void for that purpose when the Hepburn Act went into effect, at least so far as free interstate traveling when off duty was concerned. *Little Rock Ry. Co.* v. *Dowell*, 142 S. W. Rep. 165; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467.

It was beyond the power of the state court to read into the Hepburn Act an exception in favor of "gratuitous" passengers, thereby evading the effect of the law and attempting to enlarge the class to whom Congress had limited the right of free interstate transportation. *Am. Exp. Co.* v. *United States*, 212 U. S. 522.

The Hepburn Act is the paramount and sole existing law on the subject of free interstate transportation, whether it is called gratuitous or free. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Fulgham* v. *Midland Valley R. Co.*, 167 Fed. Rep. 660, 662; *E. P. & N. E. Ry.*

Co. v. *Gutierrez*, 215 U. S. 87; *Cound* v. *A., T. & S. F. Ry. Co.*, 173 Fed. Rep. 527, 531; *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. Rep. 321, 330.

There is no presumption that the railroad company violated the statute and granted Schuyler a free interstate ride; and there is no evidence in the record to support any such conclusion. *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *United States* v. *Williams*, 159 Fed. Rep. 310; *Union Pacific Railway Co.* v. *Nichols*, 8 Kansas, 505.

Schuyler induced his carriage on this interstate trip by fraud and misrepresentation. He was an unauthorized intruder on the train, engaged in the commission of a misdemeanor as defined in the Hepburn Act, and had no rights enforceable at law. *Fitzmaurice* v. *N. Y., N. H. & H. R. Co.*, 192 Massachusetts, 159.

One traveling on a free pass or a mileage ticket which had been issued to another by name and not transferable is barred by his fraudulent conduct from recovering for a personal injury, unless it was due to negligence so gross as to show a willful injury. *Tol., Wab. & West. Ry. Co.* v. *Beggs*, 85 Illinois, 80; *Way* v. *C., R. I. & P. R. Co.*, 64 Iowa, 48; *Condran* v. *Chi., Mil. & St. P. Ry. Co.*, 67 Fed. Rep. 522; *Tol., Wab. & West. R. Co.* v. *Brooks*, 81 Illinois, 245; *C., B. & Q. Ry. Co.* v. *Mehlsack*, 131 Illinois, 61; *Godfrey* v. *Ohio & Miss. Ry.*, 116 Indiana, 30; *McVeety* v. *St. P. & Minn. Ry.*, 45 Minnesota, 268; *McNeill* v. *Durham & Charlotte R. R.*, 31 Am. & Eng. Railroad Cas. (N. S.) 285; *Railroad Co.* v. *Michie*, 83 Illinois, 431; *Robertson* v. *Railway Co.*, 22 Barb. 91; *Prince* v. *Railroad Co.*, 64 Texas, 146; *Railway Co.* v. *Campbell*, 76 Texas, 175; *Way* v. *Railway Co.*, 74 Iowa, 463.

To the same effect see: *Harmon* v. *Jensen*, 176 Fed. Rep. 519; *Sessions* v. *So. Pac. Co.*, 159 California, 599; *Norfolk &c. Ry.* v. *Bondurant*, 107 Virginia, 515; *Duncan* v. *Maine Cent. R. Co.*, 113 Fed. Rep. 508; *Brown* v. *M., K.*

& T. Ry. Co., 64 Missouri, 536; *Moore* v. *Ohio River R. R. Co.*, 41 W. Va. 160.

Good faith on Schuyler's part does not affect this case. *Clement* v. *Dwight*, 121 N. Y. Supp. 788, 791; *Rudy* v. *Railway Company*, 8 Utah, 165.

Schuyler's right was in no way affected by any belief he may have entertained as to his right to ride on his ticket. *Crosby* v. *Buchanan*, 23 Wall. 420, 458; *Gardner* v. *N. H. & N. Co.*, 51 Connecticut, 143.

Inasmuch as Schuyler was denied by the Federal statute the right to a free ride on an interstate trip—of which law and denial he is presumed to have had knowledge—the conductor could not by mere acquiescence confer such a right on him. *Clark* v. *C. & N. W. R. Co.*, 165 Fed. Rep. 408; *Purple* v. *U. P. R. Co.*, 114 Fed. Rep. 123; *Condran* v. *Ry. Co.*, 67 Fed. Rep. 522; *Grahn* v. *International &c. R. Co.*, 100 Texas, 27; *McVeety* v. *St. Paul &c. R. Co.*, 45 Minnesota, 268.

Schuyler was not an accepted gratuitous passenger. No contract to permit him to ride free was ever made between him and the carrier. *Ewell* v. *Daggs*, 108 U. S. 143; *Holman* v. *Johnson*, Cowp. 341; *Bank of United States* v. *Owens*, 2 Pet. 527; *Pullman's Car Co.* v. *Transp. Co.*, 171 U. S. 138, 151; *Duncan* v. *Maine Cent. R. Co.*, 113 Fed. Rep. 508.

The verdict of the jury and the judgment of the state Supreme Court are not supported by evidence and are contrary to law. *Carter* v. *Texas*, 177 U. S. 442; *Waterbury* v. *R. R. Co.*, 17 Fed. Rep. 671.

Mr. Edward M. Cleary, *Mr. Bert Schlesinger*, *Mr. Alfred W. Agee* and *Mr. James B. McCracken*, for defendants in error, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a review, under Rev. Stat., § 709, of a judgment

recovered against the plaintiff in error for damages on account of the death of one Charles Albert Schuyler, occasioned by the derailment of a mail train at Gertney, Utah, January 14, 1907, while the deceased was riding thereon. It appears that he was an assistant chief clerk in the United States Railway Mail Service, and held a commission or certificate signed by the Postmaster General in the following form:

"POSTOFFICE DEPARTMENT, Washington, D. C.
"To Whom Concerned:
"The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk railway mail service with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the second assistant postmaster general and countersigned by James E. White.
'G. B. CORTELYOU.
"Countersigned:
"JAMES E. WHITE,
"*General Superintendent.*"

On opposite page:

"Good between all stations Utah, Idaho, Nevada, California, Montana, and Colorado."

The deceased had been called to go from Ogden, Utah, to Oakland, California, on account of the illness of his child. The child having died, he set out to return from Oakland to Ogden, and took the mail train in question with the knowledge of the train agent and conductor in charge, using as evidence of his right to transportation the com-

mission above quoted. It was on this interstate journey that the train was derailed and the deceased came to his death as already mentioned.

The defense (so far as here pertinent) was that the deceased was not traveling upon any official business that entitled him to free transportation under his commission, and that in riding free he was violating the act of Congress of June 29, 1906, commonly called the Hepburn Act (34 Stat. 584, 585, c. 3591, § 1), which forbids common carriers subject to the provisions of the act, after January 1, 1907, to "directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, except . . . to Railway Mail Service employés, post-office inspectors, customs inspectors and immigration inspectors; . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty." It was therefore contended that the deceased was a trespasser, and that the defendant was under no legal duty to care for his safety.

In the trial court there was a verdict for the plaintiffs, and from the judgment thereon the present plaintiff in error appealed to the Utah Supreme Court, which at first reversed, and afterwards, on a rehearing set aside the reversal and affirmed the judgment below, subsequently denying the company's application for a new trial. 37 Utah, 581, 595, 612.

The court held that there was no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance, of duties pertaining to the Railway Mail Service; and that upon the evidence adduced the only permissible inference was that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of that mission when the train was derailed.

But the court also found that the existence of the rela-

tion of carrier and passenger between the deceased and the railroad company, and a breach of the duty of care for the passenger's safety, resulting in his death, were so conclusively made to appear as to entitle respondents to a directed verdict on those issues, so that certain errors committed by the trial court in the instructions to the jury became of no consequence. The court said: "That the car was derailed through the negligence of appellant as alleged in the complaint, and that the deceased was killed by reason of such derailment is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject."

Upon the question of the relation of carrier and passenger the court reasoned as follows: "When he left Ogden he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which, on its face, entitled him to transportation between all stations in Utah, Nevada, and California. The commission, on its face, granted 'the facilities of free transportation on the lines named,' regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn Act took effect. The derailment and the deceased's death occurred 14 days after the act took effect. It was admitted by the parties on the trial that the deceased used the commission on the trip as 'the evidence of his right to ride—the evidence of his right of transportation,'—and that no question would be raised with respect to the exhibition of the commission to the conductor in charge of the train. The deceased, at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent, at least without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are, that the deceased, both in going

to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as 'the evidence of his right of transportation.' There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the Government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was, therefore, not a trespasser."

In dealing with the questions of law arising from this state of facts, the court held, first, that the Hepburn Act does not forbid a carrier from giving free interstate transportation to Railway Mail Service employés when not on duty and when traveling for their own benefit or pleasure, and, secondly, "Though the construction which we have given the Hepburn Act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground." And again: "We are of the opinion that when a common carrier accepts a person as a passenger, he is not permitted to deny that he

owes to him the duty of diligence, prudence, and skill, which, as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous passage permitted, by him, in violation of law." As authority for this proposition the court cited *Carroll* v. *Staten Island R. R. Co.*, 58 N. Y. 126; *Del., Lack. & Western R. R. Co.* v. *Trautwein*, 52 N. J. Law, 169; 7 L. R. A. 435; 5 Am. & Eng. Encyc. Law (2d ed.), 508, and other authorities.

It is plain that the decision adverse to the plaintiff in error was upon two independent grounds, the second ground being avowedly based upon the hypothesis that the court might be wrong in its decision upon the first.

Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employés of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is of course a Federal question.

But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an act of Congress regulating the matter) a question not of Federal but of state law.

It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances. *Murdock* v. *City of Memphis*, 20 Wall. 590, 635, 636; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Hale* v. *Akers*, 132 U. S. 554, 565; *Hopkins* v. *McLure*, 133 U. S. 380; *Johnson* v. *Risk*, 137 U. S. 300; *Beaupre* v. *Noyes*,

138 U. S. 397; *Hammond* v. *Johnston*, 142 U. S. 73, 78; *Giles* v. *Teasley*, 193 U. S. 146, 160; *Allen* v. *Arguimbau*, 198 U. S. 149, 154; *Leathe* v. *Thomas*, 207 U. S. 93, 98. In *Murdock* v. *City of Memphis* and *Beaupre* v. *Noyes* this court affirmed the judgments of the state court. In the other cases cited the writs of error were dismissed without considering the Federal questions.

Except for two contentions of the plaintiff in error now to be mentioned, a dismissal of the writ of error would necessarily follow in the present case, since the second ground of decision adopted in the state court is manifestly independent of the first and is fully sufficient to support the judgment; and except for what follows it involves no question of Federal right.

It is insisted (*a*) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Ac-